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ABSTRACT

The Capital Area School Development Association's (CASDA) School Law Conference assists school board members and administrators in the Greater Capital Region of Albany, New York, in improving their knowledge in the area of school law. In Chapter 1, "Recent Decisions of the Commissioner of Education," examines the substance and outcome of recent appeals regarding budgets, district boundary alterations, elections, interscholastic sports, school board removals, shared decision making, attendance, students with disabilities, discipline, health issues, residency, superintendents, teacher discipline, textbook distribution, and transportation. Chapter 2, "Americans with Disabilities Act: Reasonable Accommodation of Employees and Students," reviews case law pertaining to definitional issues, violations, and compliance with ADA guidelines for treatment of teachers and students. Chapter 3, "Privacy and Freedom of Speech in the Workplace for the 1990's," evaluates statutory and constitutional issues pertaining to privacy and freedom of speech expectations at the workplace, and includes a table outlining Cornell University's guidelines on responsible use of electronic communications. Chapter 4, "Recent Developments under the Public Employees' Fair Employment Act," outlines legislative changes and major board, court, and miscellaneous decisions affecting the application of the Taylor Law regulating employment practices for public employees. Chapter 5, "An Update of Section 803 Claims," considers the evolution of claims by teachers and noninstructional personnel in New York for retroactive membership in Teacher's Retirement System or Employee's Retirement System (ERS). Chapter 6, "Sexual Harassment: Current Developments," analyzes recent developments defining impermissible conduct and liability under sexual harassment case law. (TEJ)

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CASDA
ELEVENTH ANNUAL
SCHOOL LAW CONFERENCE

July 16, 1996

CENTURY HOUSE

LATHAM, NY

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Eleventh Annual School Law Conference

Proceedings of the Eleventh Annual School Law Conference sponsored by the Capital Area School Development Association (CASDA)

July 16, 1996
Century House
Latham, New York

A publication of the
Capital Area School Development
Association
School of Education
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September, 1996

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Preface

The Capital Area School Development Association (CASDA) sponsored its Eleventh Annual School Law Conference on Tuesday, July 16, 1996. The conference fulfills a need in the Greater Capital Region for school board members and administrators who desire to maintain and improve their knowledge in the area of school law. As a further service, CASDA is presenting these proceedings of the Eleventh Annual School Law Conference for each participant who attended the conference.

We thank the presenters at the School Law Conference for supplying us with a full text of their presentations. In the interest of economy and time, the papers have been reproduced as typed and presented to us. We thank the attorneys for their presentations on July 16 and for the written texts.

We are happy to present these proceedings to the participants at the conference as another service of CASDA.

Richard Bamberger
Executive Director
Capital Area School
Development Association

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THE STATE EDUCATION DEPARTMENT THE UNIVERSITY OF THE STATE OF NEW YORK ALBANY, NY 12234

DEPUTY COUNSEL

RECENT DECISIONS OF THE COMMISSIONER OF EDUCATION

Presented by

JOSEPH B. PORTER
Deputy Counsel
New York State Education Department

at

Capital Area School Development Association's
11th Annual School Law Conference

July 16, 1996
Century House
Latham, New York

I. Budgets

Appeal of Moro, 35 Ed Dept Rep 474, Decision No. 13,604, 4/27/96

In this case, the school district retained surplus funds in an amount exceeding the 2% limit imposed by Real Property Tax Law ("RPTL") §1318 in an effort to minimize any tax increase in the next fiscal year. The Commissioner held that regardless of the district's intentions, RPTL §1318 requires a district to apply any unappropriated surplus funds in excess of 2% to the district's tax levy. Accordingly, the Commissioner directed respondent to apply unexpended surplus funds which exist at the end of the 1995-96 fiscal year to the reduction of the school tax levy for the 1996-97 fiscal year, as required by RPTL §1318, and to prepare its tax warrants in strict adherence to that provision.

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Application of Morris, et al., 35 Ed Dept Rep 193, Dec. No. 13,512, 11/11/95

Although the Commissioner found that the district had violated Real Property Tax Law §1318 by retaining significant surplus funds, the Commissioner declined to remove the board since the violation of law was not wilful. The district adopted a tax warrant for the next fiscal year that indicated that unexpended surplus funds were applied in determining the school tax levy and the amount retained was less that 2% of the district's budget. However, the Commissioner noted that another violation of Real Property Tax Law §1318 might be sufficient to warrant the board's removal.

Appeal of Wiesen, 35 Ed Dept Rep 157, Decision No. 13,499, 10/23/95

This appeal involved a school district's attempt to lease temporary classroom units without voter approval on the theory that Education Law §1725 was applicable and permitted same. Education Law §1725 allows a board of education to lease personal property for up to one year without voter approval. In determining a stay application, the Commissioner necessarily decided that Education Law §1726 applies to transactions involving the leasing of temporary classroom units, not §1725. Education Law §1726(5) requires voter approval prior to the lease or lease purchase of buildings.

Appeal of Nolan, Cooper, Devlin and Cappa, 35 Ed Dept Rep 139, Decision No. 13,492, 10/23/95

Petitioners appealed various actions of a school board and the Commissioner dismissed the majority of petitioners' claims. However, the Commissioner did agree with petitioners that the hiring of a public relations firm was not an ordinary contingent expense and enjoined the district from making any expenditure of funds to hire the firm.

II. District Boundary Alteration

Appeal of Bradley Industrial Park, et al., 35 Ed Dept Rep 397, Decision No. 13,583, 3/22/96

Petitioners are the owners of several parcels of non-homestead property formerly located in the South Orangetown Central School District. Pursuant to Education Law §1507, the district superintendent altered the boundaries between South Orangetown CSD and Clarkstown CSD after the South Orangetown board transferred petitioner's properties to the Clarkstown CSD. This action permitted the South Orangetown CSD, under RPTL §1903, to lower the tax rate for homestead properties within the district while increasing the tax rate for non-homestead properties. Petitioners claimed that the transfer should be overturned because it was done solely for economic reasons. The Commissioner found that the respondents had acted consistently with their statutory authority and dismissed the appeal.

III. Elections

Appeal of Harris, 35 Ed Dept Rep 478, Decision No. 13,606, 5/9/96

This appeal involved four absentee paper ballots which decided an election by one vote. The four ballots were received from permanently disabled voters who were entitled to absentee ballots pursuant to Education Law §2018-a(2)(g). It appeared that a separate piece of paper containing a photocopy of the absentee voter oath was attached to each of these ballots before they were sent out to the voters. When the ballots were returned, with the extraneous pieces of paper attached, they were challenged as violating Education Law §2034(3)(a). The Commissioner determined that because it appeared that the extraneous papers had not actually been attached by the voters, who merely returned the ballots in the same form they received them, the voters had not done any "act extrinsic to the ballots" and the ballots should be counted.

Appeal of Loughlin, 35 Ed Dept Rep 432, Decision No. 13,591, 4/8/96

A school board rejected a nominating petition for a school board election because the nominee had signed a verification statement to the effect that he had witnessed all of the signatures on the petition when in fact he had not. The Commissioner held that since the nominee had met the requirements of Education Law §2018 and because the statement which he had signed was worded in a very confusing manner, his name should not have been removed from the ballot. Accordingly, the Commissioner ordered a new election.

Appeal of Goldman, 35 Ed Dept Rep 126, 13,487, 9/29/95

The Commissioner held that the petitioner did not meet his burden of proof to warrant overturning an election. Electioneering alone is not a sufficient basis for invalidating the results of an election. To prevail, a petitioner must show that the alleged irregularities actually affected the outcome of the election and were so pervasive that they vitiated the electoral process or demonstrate a clear and convincing picture of informality to the point of laxity in adherence to the Education Law.

IV. Interscholastic Sports

Appeal of K.R., ___ Ed Dept Rep ___, Decision No. 13,624, 6/13/96

The Commissioner dismissed the appeal of a nineteen year-old senior who was denied participation in interscholastic sports based on age eligibility rule in 8 NYCRR §135.4(c)(7)(ii)(b)(1). The student had formerly been disabled but was declassified by the committee on special education. The appeal invoked §504 of the

Rehabilitation Act and the Americans with Disabilities Act (ADA), the same grounds raised in a federal lawsuit which resulted in dismissal and a decision upholding the regulation. Consequently, the Commissioner dismissed the appeal based on res judicata.

Appeal of Berheide, 35 Ed Dept Rep 412, Decision No. 13,588, 3/30/96

This appeal concerned a 17-year old male senior who applied to play on his school's girls' varsity field hockey team. The previous year, he was determined ineligible by Section II of the New York State Public High School Athletic Association, and its decision was affirmed by the Commissioner of Education in Appeal of Berheide, 34 Ed Dept Rep 332. In the current appeal, the student was determined ineligible by a review panel within his own school pursuant to 8 NYCRR §135.4(c)(7)(ii)(c)(2). Although dismissed as moot, the decision discusses the interplay of subclause (2) and subclause (4) of 8 NYCRR §135.4(c)(7)(ii)(c), and rejects a challenge to the Department's guidelines covering male and female pupils on interschool athletic teams.

V. School Board Removals

Matter of Baldwin, memorandum decision, 1/12/96

The Regents removed board members from the Roosevelt Union Free School District for failing to meet the goals of Chapter 145 of the Laws of 1995, which provides for comprehensive State intervention in the district to address an emergency situation endangering the health, safety and education of children attending the Roosevelt schools.

VI. Shared Decision Making

Appeal of Chester, 35 Ed Dept Rep ___, Decision No. 13,616, 6/8/96

The Commissioner sustained the appeal of a parent representative to the district's shared decisionmaking planning committee where the parent alleged that the district failed to comply with the Commissioner's regulations during the biennial review of the district's shared decisionmaking plan. The district had failed to consult with and allow for the full participation of designated parent representatives. The Commissioner remanded the biennial review to the district and ordered the school board to reconvene its district wide planning committee to conduct a biennial review in accordance with the regulations.

Appeal of Greenburgh Eleven Federation of Teachers, 35 Ed Dept Rep 307, Decision No. 13,551, 2/5/96

The Commissioner found that the district had violated its own shared decisionmaking plan by failing to allow teachers to select their own building team representatives. The Commissioner ordered the district to permit the teachers' union to conduct an election to chose its teacher representatives at a faculty meeting to be scheduled at its earliest convenience.

VII. Student Attendance

Appeal of Johnston, 35 Ed Dept Rep 154, Decision No. 13,498, 10/23/95

In this case, the school district denied petitioner's son, a high school senior, credit on four courses after he exceeded the number of absences permitted under his school's attendance policy. Despite the excessive absences, the school allowed him to take and pass his final examinations. The Commissioner, citing Matter of Burns (29 Ed Dept Rep 103), held that the student must be granted credit for those courses he passed, and must also be awarded a high school diploma if those courses gave him enough credits to earn one.

VIII. Students with Disabilities

Appeal of a Student with a Disability, ___ Ed Dept Rep ___, Decision No. 13,623, 6/12/96

The Commissioner dismissed the appeal of a parent whose multiple appeals on the same issue -- timeliness of impartial hearings for his disabled son -- "are frivolous and mire the school district in unnecessary paperwork." Because a hearing decision had been issued in the case, jurisdiction rested with the State Review Officer, not the Commissioner.

Appeal of a Student with a Disability, 35 Ed Dept Rep 466, Decision No. 13,602, 4/24/96

The Commissioner sustained the appeal of a twenty year-old learning disabled student who was issued an individualized education program (IEP) diploma in June 1993 when he was 17 years old and was subsequently denied specialized reading services without being provided a new IEP and due process rights. The student never achieved above a third grade reading level and because he had not obtained a high school diploma and had never been declassified by the CSE, he remained eligible to attend school and receive a free appropriate public education under the IDEA and Education Law §4401.

Appeal of a Student with a Disability, 35 Ed Dept Rep 280, Decision No. 13,541, 1/26/96

The parent of a nine year-old child with multiple disabilities challenged the attendance of certain individuals at a meeting of the committee on special education (CSE) to discuss his son's individualized education program (IEP). Because these are special education issues governed by the Individuals with Disabilities Education Act (IDEA), and the relief sought was annulment of the CSE's determination, petitioner should have raised them at a hearing pursuant to Education Law §4404(1) and 8 NYCRR §200.5(c). Consequently, the Commissioner dismissed the appeal for failure to exhaust administrative remedies.

IX. Student Discipline

Appeal of a Student Suspected of Having a Disability, 35 Ed Dept Rep ___, Dec. No. 13,610, 5/18/96

A school board permanently suspended a student for punching an assistant principal in the jaw, spitting in his face, and yelling curses and racial epithets. Because the student had been classified as emotionally disturbed and had recently been declassified, the Commissioner remanded the issue to the district's committee on special education (CSE) to determine whether there was a nexus between her conduct and a disability. The Commissioner also noted that should the CSE find that her behavior was not disability-related, it is inappropriate in assessing a penalty to consider incidents in an anecdotal record which occurred while a student was classified for which no nexus determination was made.

Appeal of Khan, 35 Ed Dept Rep 322, Decision No. 13,557, 3/6/96

Petitioner appealed her son's permanent suspension from school. The Commissioner sustained the appeal because the permanent suspension was based upon incidents in the student's anecdotal record, which involved truancy and tardiness. Since a school may not suspend a student for nonattendance, the permanent suspension in this case was excessive.

Appeal of a Student with a Disability, 35 Ed Dept Rep 285, Decision No. 13,543, 1/30/96

The parent of a nine year-old child challenged his son's exclusion from school after the child allegedly punched a teacher's aide. Because the child was excluded pursuant to a Temporary Restraining Order of the NYS Supreme Court, consistent with Honig v. Doe, 484 U.S. 305 (1988), the appeal was dismissed because the Commissioner has no jurisdiction to review such a judicial determination. Having litigated the same claims in court and received an adverse determination, petitioner

was barred by the doctrine of res judicata from relitigating those claims in this appeal. Although constrained to dismiss the appeal, the Commissioner urged the parties to work together with the court to return the student to an in-school placement as soon as possible, given the child's age and special educational needs.

Appeal of Osoris, 35 Ed Dept Rep 250, Decision No. 13,531, 1/13/96

The Commissioner found that a long term suspension which amounted to the permanent exclusion of a student for acts of insubordination and disruption was disproportionate to the offense. The Commissioner observed that the initial period of suspension which the district sought to impose on the student was in excess of the penalties which have been sustained for students found carrying weapons on school grounds.

Appeal of Herzog, 35 Ed Dept Rep 173, Decision No. 13,505, 11/6/95

The Commissioner overturned a student's suspension from school because he was not afforded due process. Specifically, the hearing officer found the student guilty of acts with which he was not charged.

Appeal of Doty, 35 Ed Dept Rep 134, Decision No. 13,490, 9/29/95

The Commissioner upheld the suspension of petitioner's son because petitioner failed to seek review of the superintendent's decision with the board of education, and therefore the appeal was premature.

Appeal of Khan, 35 Ed Dept Rep 129, Decision No. 13,488, 9/29/95

The Commissioner upheld the permanent suspension of petitioner's son because petitioner failed to seek review of the superintendent's decision with the board of education, and therefore the appeal was premature.

X. Student Health Issues

Appeal of Kerry, 35 Ed Dept Rep 337, Decision No. 13,562, 3/8/96

Petitioner sought an exemption for his children from all AIDS instruction and the child sexual abuse curriculum on religious grounds under 8 NYCRR 16.2. The Commissioner declined to grant the exemption, noting the while opt out provisions exist under the regulations for the "methods of prevention" portion of the AIDS curriculum, there is no basis to grant exemptions from health education since it is required by state law and regulations.

Appeal of the City School District of the City of New Rochelle, 35 Ed Dept Rep 198, Dec. No. 13,514, 11/11/95

The Commissioner ordered respondent city school district to reimburse petitioner city school district for the cost of providing health and welfare services to alleged residents of respondent's district who attended private schools in petitioner's district during the 1993-94 school year. In this case, the absence of a written contract regarding reimbursement did not absolve the parties of their statutory duty under Education Law §912. Specifically, the Commissioner found that respondent district was required to pay for services where: it was undisputed that the student addresses listed were within respondent's district; respondent accepted incomplete parental affirmation forms for some students; and respondent failed to offer any evidence that either the lists or forms which petitioner provided were, in fact, unreliable.

Appeal of O'Shaughnessy, 35 Ed Dept Rep 57, Decision No. 13,464, 8/17/95

Petitioner objected to the adoption of an AIDS condom demonstration project which the school district established as part of its AIDS curriculum. The Commissioner dismissed the appeal since 8 NYCRR 135.4 requires that all elementary and secondary schools provide appropriate AIDS instruction, and petitioner had the option, under 8 NYCRR 135.4(c)(2)(i), to have her child opt-out of the lesson based on religious beliefs.

XI. Student Residency

Appeal of Brazile and Bradford, 35 Ed Dept Rep 456, Decision No. 13,600, 4/24/96

Petitioners' nephews were denied admission to the district's schools on the basis of residency. The children's mother was deceased and petitioners had assumed responsibility for them. The Commissioner found that the overwhelming weight of the evidence, including a current mortgage statement, utility bill, current telephone bill, letters of introduction from the Child Welfare Administration, oil company bill and the New York State driver's license of petitioner Brazile, established that petitioners and their nephews were residents of the district. The Commissioner ordered the district to admit the children and reminded the district of its duty to provide a free public education to district residents, regardless of their unique family circumstances or other particular characteristics.

Appeal of Brunot, 35 Ed Dept Rep 402, Decision No. 13,584, 3/23/96

A school district excluded petitioner's nieces from school on the basis of residency. The 18-year-old twins, who are American born United States citizens, had lived in Haiti with their mother for most of their lives. They moved to New York State to live with their aunt and finish high school in the United States. The

children's mother admitted that the living arrangement was temporary until she could join them and that the reason they live with their aunt is to attend school here. Therefore, the presumption of parental residence was not rebutted, and the children's residence remained in Haiti until their mother changes her residence.

Appeal of Caldera, 35 Ed Dept Rep 386, Decision No. 13,579, 3/21/96

Petitioner, a non-English speaking individual, attempted several times to enroll her daughter in the district but was unable to provide the documents respondent required for registration. The Commissioner dismissed the appeal as moot since the district eventually enrolled the student in school. However, the Commissioner reminded the district of the need to be flexible in its residency determinations, especially when individuals are not in traditional living arrangements and cannot provide the standard proofs of residency.

Appeal of Mountain, 35 Ed Dept Rep 382, Decision No. 13,578, 3/21/96

A school district excluded petitioner's children from school on the basis of residency because petitioner and her children were staying with her mother outside of the school district. Although she had been locked out of her house by her landlord and the county notified her that she would have to vacate the premises to maintain her housing benefits, at the time the decision was rendered she had not abandoned the residence nor relinquished her claim to a right to return there. Therefore, the Commissioner held that unless and until she is properly evicted from the residence, vacated therefrom by the county, or voluntarily established another residence in another school district, her children are residents and entitled to attend district schools tuition free.

Appeal of Lebron, 35 Ed Dept Rep 359, Decision No. 13,570, 3/13/96

In this case, a student chose to live with his brother in upstate New York and not with his mother in New York City. The fact that the student maintains a relationship with his mother who had otherwise relinquished custody and control of the child is not dispositive of residency. After reviewing the record, the Commissioner found that the student's residence was with his brother in upstate New York.

Appeal of Monteiro, 35 Ed Dept Rep 346, Decision No. 13,565, 3/8/96

The Commissioner sustained petitioner's appeal finding that the weight of the evidence supported petitioner's claim of residence in respondent's district. Although the evidence offered by petitioner was not overwhelming, respondent offered inconclusive proof that petitioner did not reside in its district. Specifically, respondent failed to offer proof regarding the district's alleged surveillance activities and provided no documentary evidence to establish petitioner's residence outside the district.

Appeal of Allen, 35 Ed Dept Rep 112, Decision No. 13,482, 9/5/95

The Acting Commissioner held that, while in a joint custody situation, a child's parents may select either parent's residence as the child's district of residence, the child must then actually reside in the district selected by the parents, to be eligible to receive a tuition-free education.

Appeal of Jeffrey, 35 Ed Dept Rep 103, Decision No. 13,479, 8/31/95

The Acting Commissioner held that an unsworn surveillance report was insufficient evidence to refute petitioner's assertion and other evidence indicating that her daughter lived with her in a residence within the boundaries of the school district.

Appeal of Menci, 35 Ed Dept Rep 61, Decision No. 13,465, 8/17/95

Although a child's residence is presumed to be that of his or her parent or legal guardian, that presumption is rebutted where a student is living with someone other than a parent for reasons unrelated to a school's educational program. In this case, the student's relocation to another district was prompted by a continuing conflict with her mother. The Commissioner did not find persuasive the district's argument that the student's mother retained custody and control of her where the student was sixteen years old and could chose where she wanted to live.

XII. Superintendents

Appeal of Pinckney, 35 Ed Dept Rep 461, Decision No. 13,601, 4/24/96

In this case, the board of education brought charges against its superintendent and suspended him immediately without pay pending a hearing and determination on the charges. The superintendent's employment contract was silent on the issue of suspension without pay. The Commissioner held that the superintendent possessed a property interest in his continued employment by virtue of his employment contract with the board. This property interest encompassed the full benefits of his employment, including his salary. Therefore, the superintendent was entitled to a pretermination hearing prior to the termination of his salary, and the Commissioner held that the board violated his due process rights when it suspended him without pay prior to a hearing on the disciplinary charges against him.

Appeal of Boyle, 35 Ed Dept Rep 162, Decision No. 13,501, 11/2/95

The Commissioner held that a superintendent's contract was void as against public policy because it obligated a school district to an eight-year contract, in violation of the five-year statutory limit established in Education Law §1711. The parties in this case attempted to tack on to an existing contract (with approximately three years remaining until its conclusion) a new five year agreement that would not begin to run until the original contract expired.

XIII. Teacher Discipline

Appeal of Forte, 35 Ed Dept Rep ___, Decision No. 13,607, 5/17/96

The Commissioner upheld the decision of a hearing panel which authorized a teacher's dismissal where he had been found guilty of conduct unbecoming a teacher and insubordination for poking, touching, and snapping the bras of certain female students and failing to follow directives to not touch students for any reason. Despite the teacher's unblemished 23 year record, the Commissioner supported the hearing panel's determination that since the teacher apparently failed to appreciate the seriousness of his conduct, reinstatement would be futile and dismissal was the only appropriate penalty.

Appeal of the Board of Education of the City School District of the City of New York, 35 Ed Dept Rep 418, Decision No. 13,589, 4/1/96

The school district appealed the determination of a §3020-a hearing panel which found respondent guilty of conduct unbecoming a teacher for having a romantic relationship with a student and imposed a penalty of six months' suspension without pay. While the Commissioner upheld the findings of the hearing panel, he found the penalty imposed too lenient under the circumstances and suspended the teacher for three years without pay.

XIV. Textbook Distribution

Appeal of Kelly, 35 Ed Dept Rep 235, Decision No. 13,528, 1/2/96

The Commissioner found a school district's textbook loan policy inconsistent with Education Law, Commissioner's Regulations, and Department guidelines in that it did not consider all of the needs of its nonpublic school pupils in determining the equitable allocation of its textbook resources. District textbook forms indicated that purchases would be limited to a per pupil dollar amount, and the nonpublic school had limited their requests based on the perceived cap. Therefore, even though the district approved requests in excess of the stated limit, the Commissioner concluded that the district failed to elicit the information it needed to provide textbooks to its resident students on an equitable basis.

XV. Transportation

Appeal of Frasier, 35 Ed Dept Rep _____, Decision No. 13,612, 5/24/96

The Commissioner ordered respondent to provide afternoon transportation for petitioner's daughter from the nonpublic school she attends to her home. The Commissioner found that there was no indication in the record that the nonpublic school's schedule was unreasonable or varied substantially with the public school schedule. The Commissioner further held that although considerations of economy cannot be ignored, a board of education may not be influenced by economic considerations to the point of failing to provide transportation which is reasonable.

Appeal of Skinner, 35 Ed Dept Rep _____, Decision No. 13,611, 5/21/96

In this case, petitioner's son resided more than fifteen miles from the nonpublic school he attended. Nonetheless, petitioner requested that respondent school district pay for the cost of transporting petitioner's son a distance of fifteen miles from his residence. The Commissioner held that the mileage distance in Education Law §3635 is a condition for eligibility and is not a measure of the district's obligation to provide transportation. Accordingly, petitioner was not entitled to the requested payment.

RUBERTI, GIRVIN & FERLAZZO, P.C. *Attorneys at Law*

120 STATE STREET • ALBANY, NEW YORK 12207-2829
(518) 462-0300 • FAX (518) 462-5037

E. MICHAEL RUBERTI
JAMES E. GIRVIN
SALVATORE D. FERLAZZO
KRISTINE AMODEO LANCHANTIN
JEFFREY D. HONEYWELL

GREGG T. JOHNSON
JOHN J. TOY, JR.
PATRICK J. McKENNA
KATHY ANN WOLVERTON
CHRISTOPHER P. LANGLOIS
BRUCE I. KOPF

OF COUNSEL
MARY HELEN MOSES
ELAINE M. PERS
JAMES A.P. McCARTHY
M. CORNELIA CAHILL

The Americans With Disabilities Act:
Reasonable Accommodation of Employees and Students

James E. Girvin, Esq.
Ruberti, Girvin & Ferlazzo, P.C.
Capital Area School Development Association
July 16, 1996

EMPLOYMENT ISSUES

I. Introduction to the Americans With Disabilities Act of 1990 ("ADA") In Employment

A. Legislative purposes

- The Americans with Disabilities Act ("ADA") is premised on a Congressional finding that individuals with disabilities are a discrete and insular minority who have faced unfair and unnecessary discrimination and prejudice in the form of outright intentional exclusion or limitation in the area of employment.

*NY: New York Human Rights Law ("HRL"):

Purpose

To ensure that every individual within the State is afforded an equal opportunity to enjoy a full and productive life and to be free from discrimination, prejudice, intolerance. (N.Y. Exec. L. § 290).

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B. General requirements

1. The ADA prohibits employers from discriminating against a qualified individual with a disability on the basis of his or her disability in regard to recruitment, hiring, tenure, promotion, compensation and any other term, condition or privilege of employment.

2. Specifically, the ADA requires an employer:

   a. to make a reasonable accommodation for known physical or mental limitations of an otherwise qualified individual with a disability, unless the accommodation would impose an undue hardship on the operation of the business; and

   b. to conduct pre- and post-employment examinations and inquiries that do not relate to the existence, nature or severity of an individual's disability, except under limited permissible circumstances.

3. The ADA does not require any employer to take affirmative action in hiring individuals with disabilities; the ADA does require that employers modify their existing employment procedures and practices to ensure that qualified individuals with disabilities are not discriminated against.

* NY HRL: What Is Prohibited?

It is an unlawful and discriminatory practice for an employer, because of the age, race, creed, color, national origin, sex, disability or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions, or privileges of employment. (§ 296).

II. The Duty to Make a Reasonable Accommodation

A. Protected Individuals under the ADA

1. An employer's obligation under the ADA to make reasonable accommodations extends only to "qualified individuals with disabilities" either seeking employment or currently employed.

2. The determination requires two inquiries: (1) whether or not the individual is "disabled" within the meaning of the ADA and (2) whether or not the individual is "qualified" within the meaning of the ADA.

3. "Disability"

a. An individual is considered to have a disability if that individual either:

i. has a physical or mental impairment which substantially limits one or more of that person's major life activities; or

ii. has a record of such impairment; or

iii. is regarded by an employer as having such an impairment.

b. A "physical or mental impairment" is any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, or any mental or psychological disorder.

c. "Major life activities" are those basic activities that the average person in the general population can perform with little or no difficulty, such as performing manual tasks, caring for oneself, speaking and working.

d. A physical or mental impairment will "substantially limit" a major life activity based on the effect that impairment has on the life of the disabled individual as compared to an average individual with no disabilities. Factors to be considered are:

i. the extent to which the disability totally precludes the individual from performing the activity; and

ii. absent total preclusion, the extent to which the disability limits the duration, manner, or condition under which an individual can perform the activity.

e. The ADA expressly excludes from the definition of "qualified individual with a disability" any individual currently and actually engaging in the illegal use of both lawful and unlawful drugs. However, individuals with a history of drug use who have either completed or are participating in a drug rehabilitation program do have their former addition protected.

Maddox v. University of Tennessee, 62 F.3d 843 (6th Cir. 1995) reaffirms the right of an educational employer to punish its employees for drug use or associated wrongdoing without violating the provisions of the ADA.

i. Termination of head coach for highly publicized drunk driving arrest did not amount to termination because of coach's alcoholism disability.

ii. Employers may take appropriate action with respect to an employee on account of egregious or criminal conduct, regardless of whether the employee is disabled.

iii. The issue of misconduct is separable from one's status as an alcoholic.

*NY HRL: What Is A Disability?

The term disability means:

(a) a physical, mental or medical impairment resulting from anatomical, psychological, or neurological conditions which prevent the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques; or

(b) a record of such an impairment; or

(c) a condition regarded by others as such an impairment.

In the provisions dealing with employment, the term disability is limited to disabilities which enable the complainant to perform in a reasonable manner the activities involved in the job or occupation sought or held. (§ 292.21).

The definition of "disability" in the Human Rights Law is broad enough to embrace persons who are perceived to be, but are not disabled. Moxley v. Regional Pr. Auth., Op. Gen. Counsel, Div. of Human Rights (Oct. 28, 1987) (e.g., when someone is labelled a drug user based upon a false test result).

4. "Qualified Individual with a Disability"

a. The determination requires a two part inquiry:

i. Is the disabled individual qualified for the position sought; such as possessing the appropriate educational background, employment experience, skills, etc.?

ii. If so, can the disabled individual perform the essential functions of the position held or desired with or without reasonable accommodation?

b. Essential Functions

i. Essential functions are those functions that the individual who holds the position must be able to perform unaided or with the assistance of a reasonable accommodation. The determination that a function is "essential" generally turns on the following factors:

(a) whether the position exists to perform a particular function;

(b) the number of other employees available to perform that job function or among whom that job function may be distributed;

(c) the degree of skill or expertise required to perform the function; and

(d) the amount of time spent by an employee in performing the task.

ii. Whether or not a job function is essential must be determined on a case by case basis as to each job function at issue. Borkowski v. Valley Central School District, 63 F.3d 131, 140 (2d Cir. 1995). To avoid unfounded reliance on uninformed assumptions, the identification of the essential functions of a job requires a fact specific inquiry into both the employer's description of a job and how the job is actually performed in practice. In Borkowski, a probationary appointee with a disability stated a valid claim under the ADA when she asserted that she was denied tenure as a school librarian and claimed that she could

perform the all the functions of a library teacher with the reasonable accommodation of a teacher's aide provided by the school district. Borkowski is discussed in detail at II (E)(1) of this outline.

iii. Regular attendance has been recently held to be an essential job function for the position of a teacher. Tyndall v. National Educational Centers, 31 F.3d 209 (4th Cir. 1994) (business college teacher's frequent absences rendered her unable to function effectively as a teacher, with or without reasonable accommodation).

c. Direct Threat

Qualification standards may require that an employee not pose a direct threat to the health and safety of him/herself or others.

i. In Rizzo v. Children's Learning Centers, Inc., 1996 WL 277461 (5th Cir. May 24, 1996), a hearing impaired van driver was removed from her duties of driving children based on her hearing impairment.

(a) The Learning Center was concerned that the driver would not be able to hear a child choking in the rear of the van.

(b) Federal Regulations provide that a direct threat is a threat that poses a significant risk of substantial harm to the health or safety of the individual or others. This applies when such threats cannot be eliminated or reduced by reasonable accommodation. (29 C.F.R. § 1630.2(r)).

(c) The lower court had decided that the Learning Center did not discriminate based upon the driver's disability because the driver's inability to hear a choking child was a legitimate nondiscriminatory reason to remove the driver.

(d) The U.S. Court of Appeals for the Fifth Circuit disagreed stating that the Learning Center discriminated based upon the driver's hearing disability.

(e) The case was remanded to the lower court to determine whether the driver is able to safely drive the van without presenting a "direct threat" to the children's safety.

*NY HRL: An individual with a disability must be reasonably able to do what the position requires; performance need not be perfect. Miller v. Ravitch, 60 N.Y.2d 527 (1983). An individualized, case by case analysis is necessary. Antonsen v. Ward, 77 N.Y.2d 506, 513 (1991).

- After being diagnosed as having multiple sclerosis, a school bus driver was dismissed based upon the school district's physician's determination that the disease made the driver medically unqualified to drive a school bus. The HRL protected the bus driver because, despite the disease, the bus driver was fully capable of driving the bus. Hence, the bus driver's reinstatement was ordered. Bayport-Blue Point Sch. Dist. v. State Div. of Human Rights, 131 A.D. 2d 849 (2d Dep't 1987).

- A secretary with a medical condition ("cervical lumbar strain") that caused her an unacceptably high number of days absent in a job that required consistent, good attendance was dismissed. The HRL did not protect the secretary because the disability prevented the employee from doing the job in a reasonable manner. Silk v. Huck Installation and Equip. Div., 109 A.D. 2d 930 (3d Dep't 1985).

B. Reasonable Accommodation

1. An individual will be deemed a "qualified individual with a disability" under the ADA only if (s)he is able to perform the essential functions of the job held or desired with or without "reasonable accommodation".

2. Generally, a "reasonable accommodation" is any change in the work environment or in the way things are customarily done that enables a disabled individual to enjoy equal employment opportunities.

3. Reasonable accommodations generally fall into one of three categories:

   a. accommodations that are made to allow for equal opportunity in the application process;

   b. accommodations that allow a disabled individual to perform the essential functions of the position sought or desired; and

   c. accommodations that allow individuals with disabilities to enjoy the same benefits and privileges as enjoyed by non-disabled individuals.

4. The most common types of accommodations made by employers include:

   a. making facilities used by employees readily accessible and usable;

   b. restructuring jobs;

   c. allowing part-time and/or modified work schedules;

   d. acquiring or modifying equipment or devices;

   e. providing readers and interpreters; and

   f. reassigning an employee to a vacant position.

5. An employer is not required to make a reasonable accommodation merely because an employee requests it. However, the disabled individual may be the best source of guidance as to what particular accommodation will best offset the disability.

6. a. Employer attempted reasonable accommodation:

Riley v. Weyerhaeuser Paper Co., 898 F. Supp. 324 (E.D.N.C. 1995), provides an analysis for determining whether an employer is required to transfer an employee to another one of its facilities to accommodate his/her disability. An employee was diagnosed with Multiple Sclerosis (MS) and his own physician determined that the disease prevented him from safely performing his job of operating machinery at the paper company.

   i. The analysis turned on whether the Company had a regular practice of transferring employees between facilities. As the Company in this case had no such practice, the court found that there was no ADA

violation for not transferring the employee to another facility. The court made two additional observations worth noting:

(a) It is apparent that imposing an obligation to retrain an employee in a new line of work goes far beyond the intended scope of the ADA, and

(b) In determining that the employer did not discriminate against the employee, it was significant that the employer retained the employee for over six months while investigating and considering his condition and capabilities.

b. Employer did not accommodate:

Corbett v. National Products Co., 1995 U.S. Dist. LEXIS 6425 (E.D.Pa. 1995), provides that a reasonable accommodation for alcoholism may include allowing an employee to take a leave of absence to seek treatment. A company which failed to grant one of its salesman an unpaid leave of absence to seek treatment for alcoholism violated the ADA. Note that the Pennsylvania court awarded the alcoholic employee:

i. $76,000 in back pay,
ii. $63,000 in front pay,
iii. $50,000 in compensatory damages (the maximum damages award under the ADA for employers between 15 and 100 employers),
iv. $500 for failure to pay his wages in a timely manner,
v. $154,569 in attorney's fees,
vi. $7,800 in costs and expenses, and
vii. $4,600 in prejudgment interest.

*NY HRL: Disabilities and Performing A Job In A Reasonable Manner

Drugs and Alcohol

An employee who is addicted to drugs or alcohol is deemed to have a "disability," but the HRL does not require employment of an individual currently under the influence

of alcohol or drugs, and the reasonable accommodation determinative factor rests upon the ability of the employee to perform the job in a reasonable manner.

- A police officer who was an alcoholic was not protected by the HRL because the long term effects of alcoholism could result in a diminished capacity to perform police functions and exercise the judgment required of one who is armed at all times and charged with the safety and well-being of the general public and that of his fellow officers. Smith v. Ortiz, 136 Misc. 2d 110, 113 (1987).

- An alleged drug abuser was protected by the HRL because the employer did not demonstrate that the job was not performed in a reasonable manner. Doe v. Roe, Inc. 160 A.D.2d 255 (1st Dep't 1990).

Obesity

Obesity has been "deemed" a disability under the HRL and obese individuals have been protected from discrimination when capable of performing the job in a reasonable manner.

- A five-foot-six-inch 249 pound person was denied employment solely because of her weight. The potential employer found the candidate "medically not acceptable" and expressed concern that gross obesity would pose a significant risk to short and long term disability and life insurance programs. The New York Court of Appeals held that the law did not permit employers to refuse to hire qualified individuals simply because of "a possible treatable condition of excessive weight." Division of Human Rights v. Xerox, 65 N.Y.2d 213 (1985).

- A probationary employee with the Department of Environmental Control ("DEC") alleged that he was dismissed due to his overweight condition. The Appellate Division for the Third Department ruled that the dismissal - based on ratings during training that were consistently poor due to his weight, personal hygiene, and bad attitude - was not a

violation of the Human Rights Law. Velger v. Williams, 118 A.D.2d 1037 (3d Dep't 1986).

AIDS

- An employee infected with the AIDS virus has a disability as defined by § 291.21. Where a waiter diagnosed with AIDS was discharged by his employer, a N.Y. court upheld the Commissioner of the Human Rights Division's award of back pay and $5,000 for mental anguish. Club Swamp Annex v. White, 167 A.D.2d (2d Dep't 1990).

C. Undue Hardship

1. The ADA requires an employer to perform reasonable accommodations for an individual with a disability. An accommodation will not be reasonable, and thus will not be necessary, if providing the accommodation would impose an "undue hardship" on the employer's business operation.

2. "Undue hardship" means any significant difficulty or expense in, or resulting from, the provision of the accommodation.

   a. "Undue hardship" determination may take into account the financial realities of the particular employer.

      i. However, the costs of making an accommodation must be significant to the employer for it to be an undue hardship.

      ii. An employer may not consider the relative value of the position at issue in assessing whether the proposed accommodation would work an undue financial hardship.

   b. The term also refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business.

3. The fact that a particular accommodation poses an undue hardship relieves the employer of the obligation under the ADA to implement that particular accommodation. The employer, however, must implement any other alternative accommodation that would not pose an undue hardship. Only after concluding that no possible accommodation is possible without undue

hardship is an employer free to turn away an applicant or employee with a disability.

4. Myers v. Hose, 50 F.3d 278 (4th Cir. 1995) illustrates the limits of reasonable accommodation:

   a. A school district bus driver had an extensive history of chronic heart disease and hypertension, such that he might lose consciousness behind the wheel and endanger the lives of his passengers. The driver was unable to pass required Department of Transportation or County physicals.

   b. After the driver had exhausted his paid sick leave and annual leave, the District gave the driver the option of resigning, being dismissed, or retiring with benefits.

   c. The bus driver proposed an accommodation which would have required the District to grant him additional paid leave (at half his salary) to "cure his disability."

   d. The court concluded that this proposed accommodation was not reasonable because:

      i. the length of time required to "cure" the driver's disability was speculative and potentially indefinite; and

      ii. requiring paid leave in excess of the employee's scheduled amount would unjustifiably upset the employer's settled budgetary expectations.

   e. Accordingly, because no conceivable accommodation could be considered reasonable, the bus driver was not a "qualified individual with a disability" and the District was entitled to terminate his employment.

D. Collective Bargaining Agreements

The reasonableness of an accommodation must be weighed even when it conflicts with the provisions of a collective bargaining agreement.

In Emrick v. Libbey-Owens-Ford Co., 875 F. Supp 393 (E.D. Tex. 1995), an employee with Multiple Sclerosis became unable to perform the function of his job

as a clerk. The company was not able to make a reasonable accommodation for him and he was discharged.

One or more of the [company's] employees was allegedly willing to volunteer their position for Emrick even though he had less seniority in the system governed by a collective bargaining agreement. Apparently, Emrick would have been able to perform the functions of the job(s) held by the more senior employees.

1. "The general rule under the Rehabilitation Act was that reassignment of an employee in violation of a CBA was per se unreasonable [Citations omitted]." Emrick, at 395. The rationale was that "the rights of one employee should not prevail over all other employees covered by a [CBA] or seniority system. [citations omitted]." Emrick, at 395.

2. The court in Emrick, however, held that Rehabilitation Act decisions are not binding in ADA cases.

3. The court decided that under the ADA "when reassignment of an otherwise qualified employee would conflict with an otherwise valid collective bargaining agreement or seniority system, this conflict shall be weighed by the fact finder in evaluating the reasonableness of such an accommodation under the ADA." Emrick, at 397. "[The] voluntary relinquishment [of a position by a more senior] employee is a possible means of reasonable accommodating under the ADA." The possibility was sufficient to create an issue of fact for subsequent determination.

E. Effect of the ADA on District Tenure Decisions

1. In Borkowski v. Valley Central School District, 63 F.3d 131 (2d Cir. 1995), the Second Circuit expressly addressed the impact of ADA requirements in the context of public school employment and tenure determinations:

   a. Although suit was actually premised on Section 504 of the Rehabilitation Act [prohibiting discrimination on the basis of disability by any employer receiving federal funding], courts have held that the provisions of the ADA and the Rehabilitation Act are functionally interchangeable.

   b. Kathleen Borkowski was hired by the District to serve as a library teacher for the standard probationary period. During the initial interview process, Borkowski had revealed a 1972 automobile

accident which affected her memory and concentration, leaving her unable to deal with multiple simultaneous stimuli.

c. Borkowski was denied tenure three years later premised on the conclusion of school officials that she demonstrated poor classroom management skills. The lawsuit followed.

d. The court first concluded that although Districts have discretionary authority to make tenure decisions, the authority is limited by the obligation to act in a non-discriminatory fashion.

i. The fact that the District concluded that Borkowski's performance was inadequate did not allow the District to simply deny her tenure. Rather, the District was obligated to consider whether her known disability was a factor in her poor performance and whether her disability could be reasonably accommodated.

e. "Classroom management" may be an essential aspect of the position of tenured library teacher.

f. Borkowski's suggestion that the provision of a teaching aide would allow her to perform the essential functions of a tenured library teacher satisfied her burden of producing a reasonable accommodation.

g. The District's assertion that the provision of an assistant constituted an undue hardship as a matter of law was unfounded absent evidence as to the cost of providing a teacher's aide, the District's budget and organization, and other relevant factors.

h. The Court therefore concluded that Borkowski stated a valid claim for disability discrimination under the ADA and remanded the matter back to the trial court for further proceedings. Presently, there is no published decision from the remand to the lower court.

F. Selecting the Reasonable Accommodation

Employers should follow a four step process in determining the most appropriate reasonable accommodation:

1. Determine the essential functions of the position sought or held;

2. Determine through consultation with the employee how his or her disability limits the individual's ability to perform the essential function;

3. Identify possible accommodations to overcome the disability, and assess their relative effectiveness and feasibility; and

4. Select an accommodation, giving due weight to the disabled individual's preferences where possible, that best serves the employer's and employee's needs.

III. Pre-Employment Inquiries

A. The ADA generally prohibits employers from inquiring about the existence, nature, and/or severity of a disability of an individual seeking employment.

1. Types of prohibited inquiries:

a. Direct inquiries: "Do you have cancer?"

b. Indirect inquiries:

i. "Are you aware of any disabilities that would affect your ability to perform this job?"

ii. "How many days were you sick last year?"

iii. "How much alcohol do you drink per week? Have you ever had a drinking problem?"

iv. "Have you ever been treated for a mental health problem?"

c. Employers may not use an application form that lists a series of disabling conditions and requests that the applicant check applicable disabilities.

B. The prohibition is subject to certain limited exceptions:

1. An employer may make pre-employment inquiries into the ability of an individual known to have a disability to perform job-related essential functions, with or without a reasonable accommodation.

a. This inquiry must be narrowly tailored to address only the essential job function.

b. Employers may likewise ask disabled applicants to demonstrate how they can perform the essential job functions, with or without reasonable accommodation.

C. In all cases, the test of whether a particular employer inquiry is permissible or prohibited turns on whether the inquiry is likely to elicit information about an applicant's disability rather than the applicant's ability to perform job-related functions.

1. No violation occurs if an applicant discloses the existence of a hidden disability without any prompting on the part of the employer. The employer may then ask questions relating to the ability of the individual to perform the essential functions of the job with or without reasonable accommodation.

2. An applicant's disclosure of a hidden disability, however, does not allow the employer to ask questions directed at the nature or severity of the disability.

D. The inability of a District to inquire into the existence, nature, and/or severity of an individual's disability limits the District's obligation to provide a reasonable accommodation to disabled individuals:

1. An employer is obligated to accommodate only those disabilities that are obvious or called to its attention by the employee. Stola v. Joint Industry Board, 889 F.Supp 133, 135 (S.D.N.Y. 1995) [employer not charged with knowledge of plaintiff's disability where (1) plaintiff himself was unaware of condition, (2) plaintiff did not inform employer of condition in any event, and (3) plaintiff's misbehavior was consistent with non-disabling poor judgment].

2. Therefore, the ADA places the responsibility of disclosure squarely on the shoulders of the applicant or employee seeking to benefit from the Act's provisions.

V. The ADA, N.Y. Education Law § 913, and Civil Service Law §§ 71, 72 and 73

A. N.Y. Education Law § 913

A Board of Education may direct any of its employees to submit to a medical examination in order "to safeguard the health of children attending public schools . . . . to determine the physical or mental capacity of such person to perform his duties" and may use the findings in evaluating the "person examined for disability retirement." (N.Y. Educ. L. § 913). Care must be exercised that such direction

does not violate the ADA which requires that employee medical examinations must be job-related and justified by business necessity. Three instances when on-the-job exams are permissible under the ADA:

1. employee is having difficulty performing the job effectively (e.g., an employee is falling asleep on the job and an examination is needed to determine if she has an underlying impairment and needs reasonable accommodation);

2. employee becomes disabled (e.g., an employee is injured on the job, has requested an accommodation; the exam determines if he meets the ADA's definition of individual with a disability, and can perform essential functions with or without reasonable accommodation); and

3. the employee requests an accommodation and an examination is necessary to determine if the employee has a covered disability and help identify an effective accommodation.

B. NY Civil Service Law §§ 71, 72 and 73

New York Civil Service Law ("CSL") § 71 provides that an employee with a work related injury is entitled to a leave of absence from his/her position for at least one year. Following that one year period, the District may separate the individual from employment. CSL § 73 provides that an employee who has been absent continuously from and unable to perform the duties of his/her position for one year or more by reason of a non-work related disability may be terminated from employment following due process. Both CSL §§ 71 and 73 further provide that following termination, if the employee can show (s)he is physically and mentally fit to perform the duties of the position, then the employee may make an application for reinstatement to the local Civil Service Commission and may ultimately be reinstated to the position, if it is vacant, or placed on a preferred list for the next available opening. Similarly, CSL § 72 permits the district to request that the Local Civil Service Commission conduct a medical examination to determine whether an employee is fit to perform his/her duties. If, upon such medical examination, the appointed medical officer certifies that the employee is not fit to perform his/her duties, then the district can place the employee on a leave of absence for a one year period.

When conducting the analysis of whether an employee can be separated from employment in accordance with CSL §§ 71 and/or 73, and whether an employee is fit to perform his/her duties under CSL § 72, a school district must determine whether the employee can perform the essential functions of his/her position in accordance with the ADA and HRL, rather than every function of the position.

EDUCATION/STUDENT ISSUES

VI. ADA - Application To Students

A. Title II of the ADA: Prohibits public schools ("public entitles") from discriminating on the basis of disability. The ADA also provides that no otherwise qualified individual with a disability shall by reason of the disability be: (1) excluded from participation in; (2) denied the benefits of; or (3) subjected to discrimination by any services, programs or activities of a public entity. Title II specifically provides:

> no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132.

B. Section 504 of Rehabilitation Act of 1973 ("Section 504"):

1. Prohibits discrimination solely on the basis of a handicap/disability to any otherwise qualified individual in a program or activity receiving federal financial assistance.

2. Definitions

a. Individual with a Disability:

Any person who (a) has a physical or mental impairment which substantially limits one or more of such person's major life activities (b) has a record of such impairment, or (c) is regarded as having such an impairment. 29 U.S.C. § 706(8)(B)

(1) physical or mental impairment:

Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs: cardiovascular; reproductive, digestive, genitor-urinary; hemic and lymphatic; skin; and endocrine; or

Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 34 C.F.R. § 104.3(j)(2)(o)(A) and (B).

(2) major life activity:

Caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 34 C.F.R. § 104.3(j)(2)(ii).

b. Qualified individual with a disability:

An individual with a disability who, with or without reasonable modifications to rules, policies or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity. 42 U.S.C. 12131(2).

Interplay of Section 504 and ADA

- ADA applicability does not hinge on receipt of federal funds (ADA applicable to private schools)

- ADA interpreted to adopt standards of § 504

Note: OCR has stated that to qualify for services under Section 504, it is not necessary that a student's disability substantially limit the major life activity of learning. Students may need help from a school district to access learning even though their disability does not affect their ability to learn (e.g., as in the case of an asthmatic child who cannot remain in school without regular administration of medication). OCR Response, 23 IDELR 504 (1/4/95).

VII. Reasonable Accommodations: New Technology Makes Curriculum More Accessible

A report issued by the Annenberg Washington Program in Communications Policy Study of Northwestern University addressed in the November, 1995 issue of the ADA Compliance Guide concluded that classrooms can be made "truly inclusive" by using new technology to accommodate students with disabilities (e.g., CD-ROMs, digitized books, voice-activated software, and on-line databases. The report cites as examples:

A. a 6 year-old with cerebral palsy and a moderate to severe hearing loss who could not hold a book but was able to read a Computerized book:

B. a graduate student with a learning disability and hearing loss is working on computer software that displays text book pages on a computer screen. A voice reads aloud as the text is highlighted on the screen;

C. a fourth-grader in a mainstream classroom who loves to read has cerebral palsy and a significant visual impairment. The student composes her remarks on a computer for presentation to her classmates. Difficulties other students have in understanding her speech are overcome through her use of a computer's speech output capability;

D. a high school junior with learning disabilities and handwriting problems uses a computer to organize his ideas and thoughts in a legible manner;

E. a college freshman who had a brain-stem stroke is able to activate computer commands by using a camera that is attached to a computer. The camera focuses just below her hairline. By blinking her eyelids, the only muscle she can control, she can activate the computer.

VIII. Miscellaneous Student Issues

A. Denying Bus Ride To Student Violated Title I

A school district in California violated the ADA by denying a student who used a wheelchair the right to ride the bus on a school field trip, even though the student was able to sit up in the bus seat, and the student's wheelchair could have been placed in the luggage compartment. The student's mother complained after the incident and the district brought itself into compliance with the ADA by taking voluntary remedial action. The district:

1. developed a plan that provides bus accommodations for field trips,
2. counseled the teacher that denied the student the right to ride on the bus, and
3. notified all staff about the new plan and the obligation to provide all necessary accommodations.

OCR Letter finding review published in ADA Compliance Guide February, 1996.

B. Failure to Ensure Student Given Medication Violated Title II

A student with Attention Deficit Hyperactivity Disorder ("ADHD") spray painted school walls.

The school district called the police and suspended the student for six days - there was no arrest. The student's mother sued the school district on two claims:

1. the district's actions violated Title II of the ADA which prohibits a public entity from discrimination based on a disability, and

2. the district for failed to provide her son with his prescribed dosage of ritalin. (The student took two daily doses, one at home before school and the second in school - dispensed from the special education office as required by the school.)

The Office of Civil Rights determined that contacting the police was mentioned in the school discipline policy and did not constitute discrimination based upon the student's disability. The District did, however, violate the ADA by failing for a period of six months to ensure that the student was given his daily dosage of medication.

C. Program Accessibility

The Chicago Board of Education recently settled an ADA claim alleging that mobility impaired students were excluded from participating in the district's magnet schools because only 7 of the 45 magnet schools were fully accessible.

Magnet schools typically offer specifically tailored educational curricula around a specific theme, such as math, fine arts, or foreign languages.

Accusations were made that students with handicaps were being denied the best that Chicago schools had to offer because of their handicaps.

OCR and the Chicago Board of Education agreed that:

1. By the year 2000, the district will, in each type of magnet school, modify the exterior routes, entrances, rest rooms, enough classrooms and other features on the first floor to ensure that those portions are accessible. The board estimated that it would cost about $65 million to make these changes. This will achieve accessibility in 22 of the 45 magnet schools.

2. If a facility's classes are inaccessible, the district will reassign them to an accessible school.

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3. The district agreed to encourage parents of mobility-impaired students to apply to accessible magnet schools for the 1997-98 school year. The city will launch a campaign featuring public meeting and notices, as well as by mailing a letter to the parents of mobility-impaired students.

ADA Compliance Guide June 1996.

D. District Violated ADA and Section 504 In Ordering Diabetic Student to Test Blood Outside Classroom

The Office of Civil Rights recently ruled that a school district violated Section 504 and the ADA when it required a ten-year-old diabetic student to test his blood glucose level at a location outside the classroom. The requirement was not based on the student's individual needs but on a school-wide practice. The District also violated Section 504 by failing to specify the location of the testing on the student's IEP so as to give notice to the parent of the determination and the opportunity to appeal. 23 IDELR 1144 (3/17/95).

F. OCR Investigation Reveals District Playgrounds Violated ADA

The ADA requires that school districts operate each program, service or activity such that, when viewed in its entirety, it is readily accessible and useable by disabled individuals. In San Francisco Unified School District, 23 IDELR 1200 (11/26/95), OCR reviewed: (1) whether the route to District playgrounds was firm, accessible and slip resistant; (2) the range of activities accessible to individuals with various disabilities via ramps or other means; and (3) whether the surface beneath the playground equipment was firm, stable and slip resistant. OCR ultimately concluded that several of the schools playgrounds were inaccessible and did not offer disabled students an adequate range of activities, in violation of the ADA.

G. ADA Damages, Attorneys' Fees and Costs Awarded: Over $360,000

In Grantham v. Moffett, (23 IDELR 640, 1/3/96), the first jury trial under the ADA, the District Court for the Eastern District of Louisiana awarded damages, attorneys fees and costs to a deaf student teacher who was discriminated against by a university in violation of Title II of the ADA. Specifically, the university refused to admit the student teacher to its professional education program for student teaching of elementary school children. The jury awarded the plaintiff $181,000 in damages and the court awarded attorney's fees and costs approximately the same amount.

IX. New Education Department Compliance Guide

A new guide issued by the U.S. Department of Education, Compliance with the Americans with Disabilities Act: A Self-Evaluation Guide for Public Elementary and Secondary Schools, is available (800 949-ADA, stock # 065-000-00774-6, one free, addition $21 ea.).

BIK memos MMACADA IJT

Privacy and Freedom of Speech in the Workplace for the 1990s

by Norma Meacham, Esq.
and
Melvin H. Osterman[1]

CASDA Summer Law Conference
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Conventional wisdom suggests that the things we really care about we embody in our constitution. That, I submit, is not really accurate. Thou shall not kill; thou shall not steal; thou shall not therefore bear false witness are essential societal principles, yet one of them are embodied in our State of Federal Constitutions. That is because no one seriously would question them. Instead, in our view, we afford constitutional protections to rights that are controversial—to rights to which from time to time may infringe upon other societal concerns. Inclusion in the constitution resolves the issues when such a conflict arises. Thus, for example, when the right to free speech conflicts with the desire of the Klu Klux Klan to hold a march, the Constitution tells us that the right of free speech must be respected. Similarly, when it seems cost–effective to provide special education services within a parochial school, rather than at a neutral site, the constitution tells us that concern about government entanglement within an organized religion is the predominant value.

Public schools are not immune from the tensions between competing values. The last two examples make that clear. The range, however, is not limited. Attached to these remarks are a list of areas in which a tensions may arise between some statutory or constitutional right and some school activity. Some of these are obvious; some are less so. For example, does a taxpayer who believes that one of your teachers is taking excessive amounts of leave have a right to inspect or copy the employee's time and leave records? What role if any, does the employee's right to privacy play in the resolution of this issue?

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[1] Ms. Meacham is Director of Human Resources of the Unified Court System of the State of New York. The views expressed are her own and do not necessarily represent the views of the State or the State Judiciary. Mr. Osterman is a member of Whiteman Osterman & Hanna. Since they are married, their views, more often than not, coincide.

We would like to spend some time with you reviewing these principles. We will talk about them primarily as school based issues come into conflict with freedom of speech and privacy in the workplace. We will try to give you some insight into the principles the Courts and the Commissioner use in analyzing cases that come before them.

These remarks are time specific. The concerns of one generation are not of necessarily those of the next. Black armbands supporting anti-war demonstrations seem of little relevance to the 1990s. The hot topic of today—use of electronic communication, PCs and e-mail——may seem old hat and well-settled in ten years. The principles, however, that resolve one issue will resolve the other.

All constitutional rights require a balancing of two competing interests—a legitimate governmental interest in maintaining order and safety or accomplishing its mission and the right of citizens to be free from governmental restraints or intrusion on free speech and to maintain privacy.

We have an important caution as we begin our analysis. The legal right to define or to do something does not mean that such a right should be exercised. The fact that you have the right to require an employee to open the trunk of his car in your parking lot, does not mean that you should do so. Wholly apart from whether or not you have a right to do so, the reaction you engender may be entirely disproportionate .Even if you have the right to mandate random drug tests, unless you have some specific goal to be accomplished, you may reap a harvest of employee ill-will, for little practical purpose, Employees have not only their usual recourse of grievances and the right to challenge discipline, in the context of constitutional violations. They also are entitled to sue you under Section 1983 in a federal action for monetary damages. Even if you prevail, you are likely to have enriched the legal profession out of all proportion to the significance of the issues involved.

Free Speech in the Workplace

The constitutional basis for free speech in the schools is the First Amendment of the Constitution. It prevents government from unreasonably interfering with freedom of expression. "Speech" for this purpose includes, in addition to pure speech, writing in a school newspaper, letters to the editor, and symbolic speech such as armbands or buttons. Prior restraint of freedom of expression is harder to defend than action taken after later evaluation.

This is an issue that is a special public sector issue. The constitutional right to freedom of expression does not exist in the private sector. On the other hand, issues such as the right of an employer to require that communication in the workplace

take place only in the English language can and do arise in the private sector. They do so, not as constitutional issues, but as a derivative of a variety of anti-discrimination laws.

Privacy in the Workplace

The constitutional basis for privacy in the workplace is the Fourth Amendment which gives your employees a reasonable expectation of privacy and freedom from search and seizure by government without a reasonable basis. The protection is the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures..." Again here, the limitation is on government. In the private sector an employer has much greater latitude in searching property.

The constitutional protection does not extend merely to the employee's home. It includes his or her automobile, briefcase, desk and locker.

Work Rules and Reasonable Work Behavior

There are inherent management rights and rights of the sovereign (as a governmental entity) to maintain decorum and to set certain standards of behavior that conform to public policy. Your job, as school administrators, is to devise those policies which will accomplish the management goals you seek to achieve without stumbling over the Constitutional and statutory barriers which have been erected to protect individual rights.

There are special rules and special concerns which apply to schools. There is an expectation that employees will be role models for children. That may make the establishment of reasonable work rules somewhat simpler. At the same time there also is an expectation that academic freedom will allow for free interchange of ideas. The teacher who is being disciplined for his or her remarks in the classroom, the employee whose locker contained drugs may well raise a variety of constitutional protections in an effort to avoid the consequences of your management actions.

Reasonable preparation seems prudent. Cornell University has faced many of these same issues and I commend their resolution to you. A copy of the Cornell Policy is attached to these remarks .You will recall that last year that Cornell faced an issue last year when some of its students use the college's e-mail system to distribute sexist and truly tasteless and offensive materials. In another case, a Cornell student used Cornell computers to break into classified military computers The Cornell policy is an outgrowth of these and other incidents and

represents a thoughtful approach to many of these issues.

Cornell, for example, has stated its policy for privacy in electronic communications in this way:

> "The University cherishes the diversity of values and perspectives endemic in an academic institution and so is respectful of freedom of expression. The University does not condone censorship, nor does it endorse the inspection of electronic files other than on an exceptional basis (i.e., if required to ensure the integrity, security, or effective operation of university systems). Nevertheless, the university reserves the right to place limited restrictions on the use of its computers and network systems in response to complaints presenting evidence of violations of university policies or codes, or state or federal laws...." (Responsible use of Electronic Communications at 5.)

Cornell's policy took almost four years to write and is 21 pages in length including an index and special forms. Although it is more exhaustive than most of you need, it is illustrative of the legal problems and tensions in an academic community where the employer is seeking to encourage creative expression.

There is a framework for tension inherent in any constitutional issue.

Let us establish a context by setting out a list a series of school issues and the constitutional or statutory rules they implicate:

- leaflets or flyers in school mailboxes (issue of equal treatment and access and whether statutorily prohibited subjects are addressed. A union has a right to negotiate exclusive access because it is less than a public forum; there is no basis in this case to treat as impermissible content access; rationally favors a legitimate state purpose—peaceful relations with the union);

- dress, including hair (mandatory subject of bargaining under the Taylor Law unless health or safety are involved, Caps may be prohibited in the classroom as they may be distracting and interfere with the lesson being taught. Hair restrictions often raise issues on religious or ethnic significance.);

- speech at a public board meeting (case law both ways: a teacher's

remarks in a public letter critical of the school board's allocation of funds, was found to be constitutionally protected free speech in 1967 and 1964 decisions, but more recently, a superintendent's action banning speech which disrupts work rules was found not to be unconstitutional.

- e-mail (private or confidential communication versus employer's property and right to control access);

- lesson plans (academic freedom versus the employer's right to prepare for absences);

- desks and briefcases (issue is whether employee has expectation of privacy based on workplace rules and whether employer has an outweighing interest);

- use of alcohol and drugs (generally unwritten rules although some statutory basis. The issue arises as to basis for doctor's examination or drug testing);

- smoking (statutory prohibition restricts freedom);

- dating (generally no prohibitions among adults, but students and employees?);

- off duty behavior that would be unacceptable on the job (depends on the relationship between the employee behavior and the central core of the job duties . It may be okay to watch X rated movies for example but certainly not child pornography)

- medical records (FMLA confidentiality; also worker's compensation statute protection)

- time and leave records (accessible by litigation, freedom of information, but may be protected if used to determine disability under the ADA);

- statements relating to someone's sex, race, religion, national origin . . . including sexual harassment (EEO violation restricts freedom of speech);

- off-color jokes or skits (EEO violation restricts speech);

- bulletin board notices (depends entirely on what is said and whether there are restrictions on what uses other people who use the school can do. Can you post used car notices? Bake sales for the PTA, union notices? Then, you can't restrict access without a reasonable basis);

- armbands (acceptable exercise of first Amendment rights);

- political activity (certain restrictions are acceptable, Hatch Act for federal employees (1947), misdemeanor for police to solicit political funds okay (1972));

- membership in the Communist Party (1966), not a threat to teacher's employment);

- classroom discussion led by teacher (criticize school board is not protected (1988)) (not a public forum, school reserved as a forum for teaching; speech is sponsored by the school and thus subject to its authority and discretion).

Whether there is freedom of speech or expression depends on the following analysis:

- Who is the speaker? Is it a superintendent, teacher, secretary or janitor? The higher the position the higher the standard that is acceptable;

- Who is the audience? Is it a public forum, public newspaper, radio classroom, bulletin board, students; the more open and public the forum the more freedom of expression is permissible;

- What is the subject matter of the speech? Libel, bias, harassment, pornography, criticism of school or authority or pedagogical concerns, e.g., Thoreau's philosophy, Darwinism. The more directly related to academic freedom, the more protection is afforded.

- Does the government interest in safety, teaching, or being a role model outweigh the individual's right to freedom of expression? "Make love not war" is not illegal, or unsafe. The early cases focus on disruption. The question was how disruptive and how much more disruptive than in society as a whole.

What is a reasonable expectation of privacy under the Constitution?

The U.S. Supreme Court has held that "when an expectation of privacy that society is prepared to consider reasonable is infringed" a search has occurred. (United States v. Jacobsen, 466 U.S. 109, 1133 (1984) and O'Connor v. Ortega, 480 U.S. 709, 715 (1987). Consideration is given to the "uses to which the individual has put a location . . ." In Ortega, the Court stated: "Individuals do not lose Fourth Amendment rights merely because they work for the government." (717) In the same case, it stated that "constitutional protection against unreasonable searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer".

These factors are considered:

- Did the employee have reason to believe the space was private? Was the briefcase, desk or file locked? Who had access to that space? Is the workspace shared (e.g. substitute teachers)?. If the employee only had personal belongings in a locked space that no one else had access to, a violation is apt to have occurred. The workplace includes all spaces related to work and in the employer's control such as cafeterias and hallways, but not personal luggage or pocketbooks.

- Did the employer have a legitimate interest in conducting the search? Was the employer looking for an important document? Was the employee in a coma?

- How intrusive was the search? looking through a stack of files is not intrusive, taking blood samples is . . .

- Did the public interest override all the employees interest? Was the safety of the public at issue (Airline pilots shouldn't be drunk; train engineers shouldn't take illegal drugs; police who carry guns shouldn't drink).

- Did the employer make clearly defined rules? All employees know that lesson plans will be reviewed by the principal. The fact that a letter from a student was in the lesson book does not protect the teacher's privacy.

- Did the employer have a reasonable individualized basis for taking the action? Four students reported that the principal had liquor on his breath; three members of the community told the board member that the superintendent bought child pornography).

How can an employer help to define reasonable expectations?

Employers may alter an employee's expectation of privacy by defining a policy that the property of the employer is to be used only for work related purposes. This is particularly true for computers and e-mail networks. Similarly, in networked computer environments, employees should be informed that passwords will be generally available to office support staff and managers although kept in a secure way to protect unauthorized use.

Certain statutes impact employee's rights of privacy, including, for example:

- The Freedom of Information Act, (which defines when certain information must be given to the public on request and limits exclusions).

- The Family Medical Leave Act, (which defines medical records as confidential, requiring separate filing, and limits the ability to release information).

- The Ethics Law of 1987 (Education Law and Section 813 of the General Municipal Law) (which requires employees earning over $50,000 or policy makers to disclose certain financial information and business relationships and requires public inspection of this information). (Earlier executive orders were found to be overbroad and were stuck down).

- The whistleblower statute, (which protects employees from discipline or termination for disclosing information about improper governmental action which creates and presents a substantial specific danger to public health or safety).

- The recent amendments to Title VII of the Civil Rights Act of 1964, (which prohibits certain actions or expression that is biased, including sexual harassment).

- The Taylor Law (which protects certain speech of union representatives that would not be protected otherwise for employees, including the manner in which things are said. Freedom of association. Defines negotiations as necessary to effect certain changes).

How do you protect yourself. There is no magic formula. Common sense suggests, however, that you take a look at some of these issues any attempt to define your expectations is advance.

Specifically, if you provide computers for use by your students and perhaps faculty, particularly as you increasingly have access to the Internet, you should assume that efforts will be made to download materials that are pornographic or otherwise inappropriate, that your computers will have unlicensed or copied commercial programs stored on them or that they will be used to disseminate inappropriate messages. A board policy setting forth permitted and prohibited uses will be a long way towards simplifying any administrative or judicial proceeding that may result from such an action.

Similarly, if an employee or student is told that his or her locker or desk or book bag, or that trunk of his car is subject to inspection in case of reasonable suspicion of possession of drugs, weapons, or other contraband will have much less opportunity to suggest that he or she had a reasonable expectation of privacy.

The key here is notice. If you have though through some of these issues in advance and communicated them to your employees and students, you will have a much easier time defending yourself against attack.

Review the Cornell policy statement if there is time, defining specific actions. (at 7-8, 11 and at 12-18).

Free Speech or Privacy Issues . . . Unconstitutional Violation or Legitimate Government Interest?

- Leaflets or flyers in school mailboxes?
- Dress, including hair
- Speech at a public board meeting
- e-mail and use of computers
- lesson plans
- desks and briefcases
- use of alcohol and drugs
- smoking
- dating
- off-duty behavior that would be unacceptable on the job
- medical records
- time and leave records
- statements relating to someone's sex, race, religion, national origin, sexual harassment
- off-color jokes or skits
- bulletin board notices
- armbands
- button advocating a particular position (pro-union, pro-politician)
- membership in the Communist party
- classroom discussion led by teacher

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POLICY 5.1

Volume 5, Information Technologies
Chapter 1, Responsible Use

Responsible Executive Officer:
Vice President for Information Technologies
Responsible Office: Information Technologies
Issued: April 1994
Revised: October 1995

Responsible Use Of Electronic Communications

POLICY STATEMENT

Cornell University expects all members of its community to use electronic communications in a responsible manner. The university may restrict the use of its computers and network systems for electronic communications, in response to complaints presenting evidence of violations of other university policies or codes, or state or federal laws. Specifically, the university reserves the right to limit access to its networks through university–owned or other computers, and to remove or limit access to material posted on university-owned computers.

REASON FOR POLICY

The university seeks to enforce its policies regarding harassment and the safety of individuals; to protect the university against seriously damaging or legal consequences; to prevent the posting of proprietary software or the posting of electronic copies of literary works in disregard of copyright restrictions or contractual obligations; to safeguard the integrity of computers, networks, and data, either at Cornell or elsewhere; and to ensure that use of electronic communications complies with the provisions of the Campus Code of Conduct for maintaining public order or the educational environment.

ENTITIES AFFECTED BY THIS POLICY

-Endowed and Statutory Divisions of the University

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WHO SHOULD READ THIS POLICY

- All members of the Cornell University community

RELATED DOCUMENTS

University Documents	Other Documents
Abuse of Computers and Network Systems	Electronic Communication Privacy Act of 1986
Campus Code of Conduct	Family Educational Rights and Privacy Act of 1974
Code of Academic Integrity	
President's Statement, Racial and Ethnic Harassment	
President's Statement, Sexual Harassment	
University Policy 4.4, Access to Cornell Public Affairs Information	
University Policy 4.5, Access to Student Information	

CONTACTS

Direct any general questions about this policy to your department's administrative office. If you have questions about specific issues, call the following offices:

Subject	Contact	Telephone
Computers and Network Systems Electronic Communications	Vice President for Information Technologies	(607) 255-7445
Campus Code of Conduct	Judicial Administrator	(607) 255-4680
Code of Academic Integrity	Dean of Faculty	(607) 255-4843
Harassment	Office of Equal Opportunity	(607) 255-3976
	Judicial Administrator	(607) 255-4680
	University Counsel	(607) 255-5124
Health or Safety	Cornell Police	(607) 255-1111
	University Health Services	(607) 255-4082

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DEFINITIONS

These definitions apply to these terms as they are used in this policy.

College/Unit Policy Officer	A person with responsibility for issues having broad-based policy implications for students, faculty, and staff in the college/unit; an Associate Dean or similar position.
Education Records	Records specifically related to a student and maintained by an educational institution or a party acting on its behalf. These records are protected by Family Educational Rights and Privacy Act of 1974.
Electronic Communications	The use of computers and network systems in the communicating or posting of information or material by way of electronic mail, bulletin boards, or other such electronic tools.
Network Systems	Includes voice, video and data networks, switches, routers and storage devices.
System or Network Administrator	A university employee responsible for managing the operation or operating system environments of computers or network systems, respectively.
University Computers and Network Systems (University Systems)	Computers, networks, servers, and other similar devices that are administered by the university and for which the university is responsible. Throughout this policy, the shortened term "university systems" is used to mean university computers and network systems.

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OVERVIEW

Introduction to this Policy

Computers and network systems offer powerful tools for communication among members of the Cornell community and of communities outside of the university. When used appropriately, these tools can enhance dialog and communications. Unlawful or inappropriate use of these tools, however, can infringe on the rights of others. The university expects all members of its community to use electronic communications in a responsible manner.

The university recognizes the complexity of deciding what constitutes appropriate use of electronic communications services. What is appropriate or inoffensive to some members of the community may be inappropriate or offensive to others.

◆ **Caution:** Having open access to network-based services implies some risk. In a community of diverse cultures, values, and sensitivities, the university cannot protect individuals against the existence or receipt of material that may be offensive to them.

The university cherishes the diversity of values and perspectives endemic in an academic institution and so is respectful of freedom of expression. The university does not condone censorship, nor does it endorse the inspection of electronic files other than on an exceptional basis (i.e., if required to ensure the integrity, security, or effective operation of university systems).

Nevertheless, the university reserves the right to place limited restrictions on the use of its computers and network systems in response to complaints presenting evidence of violations of university policies or codes, or state or federal laws. Once evidence is established, the university authorities responsible for overseeing these policies and codes will be consulted on the appropriateness of specific restrictions, which could include the removal of material posted on a computer and/or limiting access to the university's networks.

This policy is in accordance with university policies concerning harassment, use of computers and network systems generally, and related judicial codes. Any restrictive actions taken by the university will be in accordance with guidelines and procedures set forth in these policies, codes, or laws. The restrictive actions pertaining to this policy and described below (see the *"Policy Specifics"* segment of this document) conform to the Electronic Communication Privacy Act of 1986.

◆ **Caution:** In exceptional cases, a system or network administrator may detect evidence of a violation while performing his or her duties operating or maintaining a system. In such instances, the system or network administrator should contact the college/unit policy officer, the Judicial

Policy 5.1
Responsible Use of Electronic Communications

OVERVIEW, CONTINUED

Administrator, or the Office of Information Technologies for further guidance.

◆ **Caution:** This policy does not abrogate local policies governing the operation and maintenance of university systems provided they do not conflict with the precepts of university policy. Colleges and administrative units may wish to develop ancillary procedures that support organizational requirements. Specifically, procedural guidelines with regard to security, privacy, and other areas of critical importance to the administration of these systems are not addressed as part of this policy, nor are violations of principles of network etiquette.

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PROCEDURES

Policy Specifics

1. The university reserves the right to limit access to its networks when applicable university policies or codes, contractual obligations, or state or federal laws are violated, but does not monitor or generally restrict the content of material transported across those networks.

2. The university reserves the right to remove or limit access to material posted on university-owned computers when applicable university policies or codes, contractual obligations, or state or federal laws are violated, but does not monitor the content of material posted on university-owned computers.

3. The university does not monitor or generally restrict material residing on university computers housed within a private domain or on non-university computers, whether or not such computers are attached to campus networks.

Policy Violations

Violations of this policy may involve the use of electronic communications to:

- harass, threaten, or otherwise cause harm to a specific individual(s), whether by direct or indirect reference;
- impede, interfere with, impair, or otherwise cause harm to the activities of others;
- download or post to university computers, or transport across university networks, material that is illegal, proprietary, in violation of university contractual agreements, or otherwise is damaging to the institution;
- harass or threaten classes of individuals (see next *"Caution"*).

◆ **Caution:** As a matter of policy, the university protects expression by members of its community and does not wish to become an arbiter of what may be regarded as "offensive" by some members of the community. However, in exceptional cases, the university may decide that such material directed to classes of individuals presents such a hostile environment that certain restrictive actions are warranted.

Reporting Violations

1. If you believe that a violation of this policy has occurred, contact the system or network administrator responsible for the system or network involved, who will report the incident to the college/unit policy officer in accordance with local procedural guidelines, should they exist.

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PROCEDURES, CONTINUED

2. There may be situations when the following additional offices should be contacted:

- University Health Services and/or the Cornell Police, if an individual's health or safety appears to be in jeopardy;
- University Human Resource Services, if violations occur in the course of employment;
- Office of Information Technologies, if an incident potentially bears external or legal consequences for the institution. This office is available to assist with investigations, generally under the auspices of the college/unit policy officer. You may also contact this office if you wish to report an incident but are unable to do so through normal channels.

Procedures for Systems or Network Administrators

If you receive a complaint and are presented with evidence that a violation of this policy has occurred, proceed as follows:

1. Refer to Table 2 to determine what type of violation may apply:
   - violations targeted at a specific individual(s) (4 types identified);
   - violations causing harm to the activities of others (8 types identified);
   - violations involving illegal, proprietary or damaging material (4 types identified);
   - violations targeted at classes of individuals (1 type identified).

2. If you are unable to match your incident with a description in Table 2, or if multiple descriptions seem to apply, contact your college/unit policy officer or the Office of Information Technologies for guidance.

3. Follow the guidelines in Table 2. In addition to the type of violation, the guidelines are framed by other factors, specifically:
   - who reported the violation;
   - whether you administer the university system involved or some other affected system;
   - how participants or affected parties are affiliated with Cornell.

4. In all cases, these guidelines tell you:
   - which university authority should receive a formal complaint;
   - the party or parties who normally file such a complaint;
   - what actions, if any, you should or may take.

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PROCEDURES, CONTINUED

5. Report the violation in accordance with these guidelines and those established by your college/unit.

6. Document the incident and any actions you take, recording at a minimum the information depicted in Exhibit 1 (see the *"Appendix"* Section of this document). Protect this information as you would any confidential material: update and retain it as appropriate. This information may be subject to review by appropriate university authorities, so it is important that the information be current, complete and correct, maintained in an electronic database, and easily retrievable.

In exceptional cases, the priorities of protecting the university against seriously damaging consequences and/or safeguarding the integrity of computers, networks, and data either at the university or elsewhere, may make it imperative that you take temporary restrictive action on an immediate basis. In such instances, you may take temporary restrictive action, preferably with the prior approval of the college/unit policy officer, pending final adjudication by the university. All restrictive actions taken must be documented and justified in accordance with this policy. If there is no designated policy officer, or if the policy officer is not immediately available, you may contact the Office of Information Technologies for guidance or assistance.

◆ **Caution:** In some instances, documentation prescribed above will constitute education records (see the *"Definitions"* Section of this document) and therefore will be protected under the Family Educational Rights and Privacy Act of 1974. Refer to the university's *"Access to Student Information"* Policy (Volume 4, Chapter 5) for more information.

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APPENDIX

Table 1 Excerpts from university codes and policies that may be violated when electronic communications are used inappropriately.

Violation	**Campus Code of Conduct: Title Three-Regulations for the Maintenance of the Educational Environment (RMEE) (Taken from *Policy Notebook* published August 1994)**
A	To refuse to comply with any lawful order of a clearly identifiable University official acting in the performance of his or her duties in the enforcement of University policy
B	To forge, fraudulently alter, or willfully falsify or otherwise misuse University or non-University records (including computerized records, permits, identification cards, other documents, or property) or to possess such altered documents
I	To harass, abuse or threaten another by means other than the use or threatened use of physical force
K	To steal or knowingly possess stolen property (misappropriation of data or copyrighted materials including computer software, may constitute theft)
L	To traffic, for profits or otherwise, in goods or services, when incompatible with the interests of the University and the Cornell community
Q	To sexually harass another person
U	To recklessly or maliciously interfere with or damage, in violation of University rules, computer or network resources or computer data, files, or other information
Principles	**Code of Academic Integrity (Taken from *Policy Notebook* published August 1994)**
1	Respect for the privacy of other users' information, even when that information is not securely protected
2	Respect for the ownership of proprietary software
3	Respect for the finite capacity of the system and limitation of use so as not to interfere unreasonably with the activity of other users
4	Respect for the procedures established to manage the use of the system
Statement	**CU Policy Regarding Abuse of Computers and Network Systems (Adopted and published June 1990)**
1	to respect the privacy of or other restrictions placed upon data or information stored in or transmitted across computers and network systems, even when that data or information is not securely protected
2	To respect an owner's interest in proprietary software or other assets pertaining to computers or network systems, even when such software or assets are not securely protected
3	To respect the finite capacity of computers or network systems by limiting use of computers and network systems so as not to interfere unreasonably with the activity of other users

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APPENDIX, CONTINUED

Table 2 (starting on the next page) presents general information about the kinds of violations covered by this policy; the party or parties normally serving as complainant(s); the university authorities to whom complainants normally refer incidents; and the appropriate actions and/or restrictions that systems and network administrators may take upon receiving a complaint and being presented with evidence of a violation. Instructions regarding how to proceed are intended for the system or network administrator responsible for the university resource from which the incident is perpetrated or on which the offending material resides, unless specified otherwise.

A. Violations targeted at a specific individual(s)

A1. Sending repeated and unwanted (harassing) communication by electronic mail or other electronic communications
A2. Sending repeated and unwanted (harassing) communication by electronic mail or other electronic communications that is sexual in nature
A3. Sending repeated and unwanted (harassing) communication by electronic mail or other electronic communications that is motivated by race, ethnicity, religion, gender, or sexual orientation
A4. Posting or otherwise disseminating personal or sensitive information about an individual(s)

B. Violations causing harm to the activities of others

B1. Propagating electronic chain mail
B2. Interfering with freedom of expression of others by "jamming" or "bombing" electronic mailboxes
B3. Forging, fraudulently altering, or willfully falsifying electronic mail headers, electronic directory information, or other electronic information generated as, maintained as, or otherwise identified as university records in support of electronic communications
B4. Using electronic communications to forge an academic document
B5. Using electronic communications to hoard, damage, or otherwise interfere with academic resources accessible electronically
B6. Using electronic communications to steal another individual's works, or otherwise misrepresent one's own work
B7. Using electronic communications to collude on examinations, papers or any other academic work
B8. Using electronic communications to fabricate research data.

C. Violations involving illegal, proprietary, or damaging material

C1. Electronically distributing or posting copyrighted material in violation of license restrictions or other contractual agreements
C2. Launching a computer worm, computer virus or other rogue program
C3. Downloading or posting illegal, proprietary or damaging material to a university computer
C4. Transporting illegal, proprietary or damaging material across Cornell's networks

D. Violations Targeted at Classes of Individuals

D1. Posting hate speech regarding a group's race, ethnicity, religion, gender, or sexual orientation (generall does not constitute a violation of the Responsible Use policy, but may under certain circumstances)

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APPENDIX, continued - Table 2

A. VIOLATIONS TARGETED AT A SPECIFIC INDIVIDUAL(S)

Violation	Who Files Complaint	Who Receives Complaint	Appropriate Action if Violation is Reported by Targeted Individual	Appropriate Action if Violation is Reported by Another Individual(s)
A1. Sending an individual repeated and unwanted (harassing) communication by electronic mail or other electronic communications; **OR** **A2.** Sending an individual repeated and unwanted (harassing) communication by electronic mail or other electronic communications that is sexual in nature; **OR** **A3.** Sending an individual repeated and unwanted (harassing) communication by electronic mail or other electronic communications that is motivated by race, ethnicity, religion, gender, or sexual orientation	Targeted individual, whether or not a member of the university community	Office of the Judicial Administrator Note: Cornell's Judicial Administrator can act upon a complaint only if the sender of the material is a member of the Cornell community. If the sender is not a member of the Cornell community, the Judicial Administrator will assist the targeted individual by referring him/her to appropriate sources of help outside the university.	Provide the targeted individual with the following information: 1. "Harassment is a violation of Cornell's policies and codes, and in some cases, state or federal laws. Write the sender directly and state that you find the continued correspondence to be harassing and formally ask the sender to cease all communications with you. Save a copy of this message and any other correspondence for evidence." 2. "If you continue to receive correspondence after formally requesting that the correspondence stop, notify Cornell's Office of the Judicial Administrator. Consultations with the Judicial Administrator are confidential." 3. "If you are concerned about your personal safety, contact the Cornell Police or your local law enforcement agency."	Thank the party for forwarding the information and add the following: "Harassment is a violation of Cornell's policies and codes, and in some cases state or federal laws. Complaints must be filed by the targeted person. If appropriate, please encourage the targeted person to contact Cornell's Office of the Judicial Administrator for information or assistance."

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APPENDIX, continued - Table 2, continued

A. VIOLATIONS TARGETED AT A SPECIFIC INDIVIDUAL(S), continued

Violation	Who Files Complaint	Who Receives Complaint	Appropriate Action if Violation is Reported by Targeted Individual	Appropriate Action if Violation is Reported by Another Individual(s)
A4. Posting or otherwise disseminating personal or sensitive information about an individual(s) (Examples include postings of an individual's academic records; medical information; social security number; or similar information of a personal or confidential nature that, if disseminated, could have legal or otherwise damaging implications either for the targeted person or the institution. Personal expression by an individual about another, even if posted in a public manner, is not subject to limitation or restriction under this policy, although a targeted person may have recourse under other campus policies or codes, or state or federal laws regarding harassment.)	Targeted individual **OR** System or network Administrator, in accordance with guidelines established by the designated college/unit policy officer, and in response to complaint from targeted individual. (Generally, pre-preemptive restrictive actions are not warranted but may be in exceptional cases. If the material is of such a nature that it potentially bears external consequences for the institution, contact your college/unit policy officer and the Office of Information Technologies for further guidance or assistance.)	Office of Information Technologies	Provide the targeted individual with the following information: "This material may violate Cornell's codes or policies, or possibly state or federal laws. If you wish the material temporarily restricted while you file a complaint, please contact me." Contact your college/unit policy officer or the Office of Information Technologies for further guidance or assistance.	Provide the party with the following information: "Thank you for forwarding this information. I will be working with campus authorities regarding this incident." Contact your college/unit policy officer or the Office of Information Technologies for further guidance or assistance.

APPENDIX, continued - Table 2, continued

B. VIOLATIONS CAUSING HARM TO THE ACTIVITIES OF OTHERS

Violation	Who Files Complaint	Who Receives Complaint	Appropriate Action if Violation Is Reported
B1. Propagating Electronic Chain Mail	System or network Administrator, in accordance with guidelines established by the designated college/unit policy officer, and in response to complaint from individual(s) receiving the chain mail.	Office of the Judicial Administrator	Provide the party with the following information and take steps outlined below: "Although we understand that some of these letters can be offensive or unwanted, [name of unit] cannot prevent their circulation. Forwarding chain mail using university resources violates Cornell's codes and policies, and in some cases may be illegal. I will be working with campus authorities regarding this incident." 1. Post a notice to your system alerting users to the incident and instructing them not to propagate further. 2. Refer Cornell propagators to the Office of the Judicial Administrator. 3. If the propagator(s) is not a member of the Cornell community, contact the administrator of the originating system, if possible, as a matter of courtesy or follow-up. 4. Contact your college/unit policy officer and the Office of Information Technologies if you believe the content of the material to be illegal, damaging, or otherwise to have external consequences for the institution.

APPENDIX, continued - Table 2, continued

B. VIOLATIONS CAUSING HARM TO THE ACTIVITIES OF OTHERS, continued

Violation	Who Files Complaint	Who Receives Complaint	Appropriate Action if Violation is Reported
B2. Interfering with freedom of expression of others by "jamming" or "bombing" electronic mailboxes	Individual(s) affected by the interference; **OR** System or network administrator, in accordance with guidelines established by the designated college/unit policy officer, and in response to complaint from individual(s) affected by the interference.	Office of the Judicial Administrator; **OR** Office of the College Dean (if incident is in the context of the Code of Academic Integrity; *see example incidents B4-8, below)*	Provide the party with the following information and take steps outlined below: "Attempting to interfere with the freedom of expression of others violates Cornell's Campus Code of Conduct. I will be working with campus authorities regarding this incident." 1. If the violator is a member of the Cornell community, instruct him/her to cease the activity, referring to campus policy, and contact the Judicial Administrator for further guidance. 2. If the violator is not a member of the Cornell community, contact the administrator of the originating system, if possible, as a matter of courtesy or follow-up.
B3. Forging, fraudulently altering or willfully falsifying electronic mail headers, electronic directory information, or other electronic information generated as, maintained as, or otherwise identified as university records in support of electronic communications	Individual(s) affected by the forgery or alteration, such as the recipient of fraudulent mail or the individual whose identity is forged, if applicable; **OR** System or network administrator, in accordance with guidelines, and in response to complaint from individuals(s) affected by the forgery or alteration.	Office of the Judicial Administrator; **OR** Office of the College Dean (if in the context of the Code of Academic Integrity; *see example incidents B4-8, below)*	Provide the party with the following information and take steps outlined below: "Forging, fraudulently altering or willfully falsifying university records violates Cornell's policies and codes. I will be working with campus authorities regarding this incident." If the violator is a member of the Cornell community, instruct him/her to cease the activity, referring to campus policy, and contact the Judicial Administrator for further guidance. If the violator is not a member of the Cornell community, contact the administrator of the originating system, if possible, as a matter of courtesy or follow-up.

APPENDIX, continued - Table 2, continued

B. VIOLATIONS CAUSING HARM TO THE ACTIVITIES OF OTHERS, continued

Violation	Who Files Complaint	Who Receives Complaint	Appropriate Action If Violation Is Reported
B4. Using electronic communications to forge an academic document; **OR** **B5.** Using electronic communications to hoard, damage, or otherwise interfere with academic resources accessible electronically; **OR** **B6.** Using electronic communications to steal another individual's work, or otherwise misrepresent one's own work; **OR** **B7.** Using electronic communications to collude on examinations, papers or any other academic work; **OR** **B8.** Using electronic communications to fabricate research data (Refer to the Code of Academic Integrity for additional information)	Individual whose academic work is stolen, misrepresented, or otherwise compromised or damaged; **OR** Cornell faculty member or academic department/sponsor responsible for the academic activity.	Office of the College Dean	Provide the party with the following information: "This incident may violate campus policies or codes. I will be working with college authorities to review what actions may be appropriate." Contact your college policy officer for further guidance.

APPENDIX, continued - Table 2, continued

C. VIOLATIONS INVOLVING ILLEGAL, PROPRIETARY, OR DAMAGING MATERIAL

Violation	Who Files Complaint	Who Receives Complaint	Appropriate Action if Violation Is Reported
C1. Electronically distributing or posting copyrighted material in violation of license restrictions or other contractual agreements; **OR** **C2.** Launching a computer worm, virus, or other rogue program; **OR** **C3.** Downloading illegal, proprietary, or damaging material to a university computer; **OR** **C4.** Transporting illegal, proprietary, or damaging material across Cornell's networks	Anyone who has evidence of such activities occurring or about to occur, and involving Cornell's computer and network systems.	Office of Information Technologies	Commensurate with the degree of urgency and potential damage to the institution, take pre-preemptive steps – preferably with the approval of your college/unit policy officer – including ensuring the preservation of evidence. Contact the Office of Information Technologies for further guidance or assistance. Clarification regarding C1: Responsible Use policy and procedures govern incidents involving the illegal *distribution* of copyrighted material —as transported through Cornell's networks or posted to Cornell's computers – by electronic means The *possession* of misappropriated copyrighted material by a member of the Cornell community violates the Campus Code of Conduct, the Code of Academic Integrity and the university's policy on the Abuse of Computers and Network Systems

APPENDIX, continued - Table 2, continued

D. VIOLATIONS TARGETED AT CLASSES OF INDIVIDUALS

Violation	Who Files Complaint	Who Receives Complaint	Appropriate Action if Violation is Reported
D1. Posting hate speech regarding a group's race, ethnicity, religion, gender, or sexual orientation Note: Posting hate speech generally does not constitute a violation of Responsible Use Policy, but may under certain circumstances.	Member of the targeted group; **OR** System or network administrator, in accordance with guidelines established by the designated college/unit policy officer, and in response to complaint from member(s) of the targeted group.	Office of Human Relations	Provide the party with the following information: "Although this posting/communication may be offensive to members of the community, the university is respectful of expression in its own right. However, this posting/communication may constitute harassment, which is a violation of Cornell's policies and codes, and in some cases, state or federal laws. I will consult with campus authorities regarding this incident." Contact the Office of Human Relations for guidance or assistance.

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APPENDIX, CONTINUED

Exhibit 1 *Prototype Log for Tracking Alleged Incidents in Violation of Responsible Use Policy* Confidential

Incidents in Alleged Violation of Responsible Use Policy: Referrals and Actions

Case Number..... Log Date Opened.....
UserID/NetID Involved..... Log Date Closed.....

System/Service Involved .....
Complainant .....
Initial Referral/Contact .....
Resolution thru Office/Agent .....

Incident*:

- ☐ Harassment (A1-3)
- ☐ Sensitive Information (A4)
- ☐ Chain Mail (B1)
- ☐ Mailbox Bomb/Jam (B2)
- ☐ Masquerade/Forgery (B3)
- ☐ Integrity Code Violations (B4-8)
- ☐ Copyright Infringement (C1)
- ☐ Virus/Rogue Program (C2)
- ☐ Illegal Material (C3-4)
- ☐ Hate Speech (D1)
- ☐ Ignoring Lawful Order
- ☐ Other (describe below)
- ☐
- ☐
- ☐

Comments on Incident .....

Brief Description of Incident .....

Action .....

Justifications for Actions .....

*Refer to appropriate section of this document for descriptions of (coded) incidents. If "Ignoring Wrongful Order" is checked, also check the particular violation for which the order was issued.

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RECENT DEVELOPMENTS UNDER THE PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

By: John M. Crotty

This outline covers Taylor Law developments during 1995 through early July 1996. Legislative changes, major Board, court and miscellaneous decisions are reported. The full text of the statutory amendments and decisions should be examined as appropriate to the reader's circumstances.

LEGISLATION

School districts and BOCES were prohibited from diminishing retiree health insurance benefits unless a corresponding diminution is made from active employees. (June 30, 1994 - May 15, 1996) (1995 N.Y. Laws ch. 139).

Interest arbitration extended two years for police, fire, NYC Transit Authority and MTA (1995 N.Y. Laws ch. 123 & 136); extension for NYC School Construction Authority vetoed.

Agency shop fee authorization extended for two years. (1995 N.Y. Laws ch. 311).

Compulsory interest arbitration for state police (1995 N.Y. Laws chs. 432 & 447) (compensation and compensation-related only).

New York City police and fire extended interest arbitration under PERB (1996 N.Y. Laws ch. 13 veto override) Held unconstitutional in City of New York v. PBA, 29 PERB ¶7005 (Sup. Ct. New York Co. 1996) (appeal pending).

BILLS

Independent CSL §75 hearing officer (S.1044/A.1436) (vetoed).

New York City police merger (A.8228)(vetoed).

Notice of claim and nonattorney representation at PERB (S.2835-C). (vetoed)

Nonattorney representation at PERB (S.7904)

BOARD DECISIONS

REPRESENTATION

Genesee-Livingston-Steuben-Wyoming BOCES, 28 PERB ¶4021 (Director). Employer merger creates a question of initial uniting.

United Public Service Employees Union, Local 424, 28 PERB ¶3021. After changes to its and parent's constitutions, organization ruled to be an employee organization within the meaning of the Act. (BR 27 PERB ¶3053 and 28 PERB ¶7001)

Greater Amsterdam School District, 28 PERB ¶3019. Second petition not barred by dismissal of first petition on the ground that the petitioner was not employee organization. First petition was not processed to completion under §201.3(g) of Rules.

Towns of Putnam Valley and New Paltz, 28 PERB ¶3049. No interlocutory appeal from rulings incidental to the processing of representation petitions absent unusual, prejudicial circumstances.

Eastchester Union Free School District, 28 PERB ¶3064. Union is defunct when it intentionally stops representing employees. Employees formerly represented become unrepresented, but placement is treated as a case of initial uniting.

Incorporated Village of Lake Success, 28 PERB ¶3073. Discussion of evidence necessary to establish recognition. On facts, no recognition found. (appeal pending)

County of Oneida, 29 PERB ¶3001. Election objections dismissed. Replacement ballots to be sent only on request pursuant to information conveyed by voter during call-in procedure.

County of Erie and Sheriff of Erie County, 29 PERB ¶3031. Deputy sheriffs-criminal who are engaged exclusively or primarily in the prevention and detection of crime and the enforcement of the general criminal laws of the State fragmented from a Sheriff's department unit.

IMPROPER PRACTICES

INTERFERENCE/DISCRIMINATION

City of Troy, 28 PERB ¶3027. Employer's discontinuation of membership dues and agency shop fee deductions per se interference.

Love Canal Area Revitalization Agency, 28 PERB ¶3040. Concerted presentation of a demand for grievance procedure as an alternative to unionization is not protected. Discharge, even if for that reason, is not cognizable under the Act.

Mahopac Central School District, 28 PERB ¶3045. Education Law §3813 notice of claim requirements inapplicable to charges alleging interference or discrimination against employees. Violation may exist in the absence of any union animus.

Greece Central School District (Lanzillo), 28 PERB ¶3048. Retirees could not pursue DFR charge against union regarding post-retirement request to union to file a grievance under collective bargaining agreement. No duty owed. (appeal pending)

District Council 37 (Gonzalez), 28 PERB ¶3062. Union is afforded a wide range of reasonableness in making evidentiary and tactical decisions regarding grievance processing. No breach if basic issues underlying a grievance have been presented in an understandable fashion.

Monroe BOCES #1, 28 PERB ¶3068. Employee participation committee held to be a dominated employee organization. Committee was ordered disestablished.

City of Rye, 28 PERB ¶3067. Employer's action against employee did not violate the Act because record did not establish that employer knew employee was engaged in the protected activities which allegedly caused the employer to retaliate. (appeal pending)

Staten Island Rapid Transit Operating Authority, 28 PERB ¶3080. Employee's discussion of employment issues with other employees in area where presence was authorized and in circumstances not disruptive of work held protected.

Public Employees Federation, 29 PERB ¶3027. No DFR breach in union not taking action to hold employer to contractual limits for grievance processing.

County of Nassau, 29 PERB ¶3035. Employer and incumbent union did not violate Act by continuing negotiations regarding a memorandum of agreement after a decertification petition was filed by a challenging union because the petition did not raise a bona fide representation question. The MOA constituted a contract bar to the representation petition.

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GOOD FAITH BARGAINING

Lackawanna City School District, 28 PERB ¶3023. Refusal to negotiate impact allegation is not encompassed within a unilateral change allegation.

Solvay Teachers Association, 28 PERB ¶3024. Scope of bargaining question reached although fact-finding report not issued because the parties had agreed that the negotiability determination would control inclusion or exclusion of demand from contract.

County of Rockland, 29 PERB ¶3009. Deliberate misrepresentation of finances at fact-finding violated duty to bargain in good faith (appeal pending on remedy).

Triborough Bridge and Tunnel Authority, 29 PERB ¶3012. Modified demand not new because it merely narrowed original demand. Negotiability properly measured retroactively to date demand was to apply, which was coincident with expiration of parties' last contract.

City of Buffalo, 29 PERB ¶3023. Practice of always appointing first person on civil service list is nonmandatory subject of negotiation. Accord Town of West Seneca, 29 PERB ¶3024.

Town of Carmel, 29 PERB ¶3026. Safety stipend demands arising from assignment of GML §207-c personnel mandatorily negotiable. (appeal pending)

UNILATERAL CHANGE/DISCONTINUATION OF EXPIRED CONTRACT TERMS

Deer Park Union Free School District, 28 PERB ¶3005 and 28 PERB ¶3038. A management rights clause, although broad, was nonetheless held to be a specific waiver of further bargaining rights regarding a change in practice.

Regional Transportation Authority/Regional Transit Service, Inc., 28 PERB ¶3007. As the parties converted an arbitration award into a collective bargaining agreement in effect when the charge was filed, there was no cause of action under §209-a.1(e) which necessitates an expired agreement.

State of New York-Unified Court System, 28 PERB ¶3044. Electronic recording of court proceedings not mandatorily negotiable. Legislation and judicial interpretation evidenced intent to remove subject from the scope of compulsory negotiation.

County of Nassau, 28 PERB ¶3047. Collection of fines from unit employees for parking violations did not violate the Act except as to those unit employees who were given permission to park in restricted areas.

Schuylerville Central School District, 29 PERB ¶3029. Salary increment sunsetted and, therefore, no duty to continue after expiration of contract.

Schalmont Central School District, 29 PERB ¶3036. Time off from work upon employer's approval of employee's request did not constitute practice entitling employee to time off upon demand.

SUBCONTRACTING/TRANSFER OF UNIT WORK

Town of Brookhaven, 28 PERB ¶3010. No violation in Town's discontinuing use of its employees in conjunction with loan of Town property to third party.

County of Monroe, 28 PERB ¶3025. Subcontract of cleaning, safety training and supply ordering violated Act.

County of Clinton, 28 PERB ¶3041. Subcontracting of grass mowing and road paving violated Act. No violation as to road recycling, however, as use of contractor was consistent with County's practice.

Village of Malverne, 28 PERB ¶3042. Transfer of duties involved with autumn leaf collection program violated the Act. Collection by nonunit personnel at other times or under other conditions was within discernible boundary or was incidental to other nonunit tasks. Therefore, no loss of exclusivity.

Hewlett-Woodmere Union Free School District, 28 PERB ¶3039. Transfer of unit work by abolition of unit position and creation of nonunit position violated the Act because there was no substantial difference in the duties actually performed by the incumbents. (appeal pending)

County of Erie, 28 PERB ¶3053. Lack of exclusivity is not an affirmative defense. Part of charging party's case. Discernible boundary not drawn along geographic lines because there was no relationship between proposed work location and job duties.

City of Batavia, 28 PERB ¶3076. No exclusivity where work at particular facility done by both unit and nonunit employees of employer. Subcontracting of operation to private contractor no violation.

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County of Suffolk & Sheriff, 29 PERB ¶3002. Charge dismissed because charging party union did not have exclusivity over care and custody of detainees at County facility. (appeal pending)

State of New York (DOCS) v. PERB, ___ A.D.2d ___, 29 PERB ¶____ (3d Dep't 1996). Civilianization of security services improper. Court adopts Niagara Frontier Transportation Authority (18 PERB ¶3083) analysis.

Odessa-Montour CSD v. PERB, ___ A.D.2d ___, 29 PERB ¶7009 (3d Dep't 1996). Subcontracting of bus service did not violate the Act. Charge as filed and proven established only legislative action which could not violate District's duty to bargain.

JURISDICTION

Comsewogue Union Free School District, 27 PERB ¶3047. An employer's allegation in an answer that a contract is not binding because it was not ratified or approved does not constitute a repudiation of contract within PERB's jurisdiction.

Gloversville-Johnstown Joint Sewer Board, 27 PERB ¶3051. PERB may consider any information bearing upon an exercise of discretion to defer consideration of jurisdictional issues to parties' invoked grievance procedure.

City of Troy, 28 PERB ¶3061. Jurisdictional determination deferred pending decision on appeal from confirmed arbitration award in charging party's favor.

PRACTICE AND PROCEDURES

Union-Endicott Central School District, 28 PERB ¶3006. The Board declined to review ALJ's ruling to reserve decision on an Education Law §3813 defense pending completion of hearings on the charge. There was no irreparable harm and no abuse of discretion.

Deer Park Union Free School District, 28 PERB ¶3005. An Education Law §3813 defense is waived if not raised before or in the answer to merits of a charge. Post-hearing request to amend answer to incorporate that defense was denied, there being no good cause shown for failure to raise the defense earlier. (But see Deposit)

CSEA v. PERB, 213 A.D.2d 897, 28 PERB ¶7004 (3d Dep't 1995). Confirms agency's merits deferral policy and its application.

Sidney Central School District, 28 PERB ¶3032. Education Law §3813 applicable to unilateral change case. Accord Watertown City School District, 28 PERB ¶3033.

Jefferson-Lewis-Hamilton-Oneida BOCES, 28 PERB ¶3028. Ruling denying intervention reviewed on an interlocutory basis.

United Public Service Employees Union Local 424, 28 PERB ¶3036. Post-petition compliance with Rules requirements insufficient to permit processing of representation petition.

Odessa-Montour Central School District, ___ A.D.2d ___, 29 PERB ¶7009 (3d Dep't 1996). PERB is "court of original jurisdiction" to which Education Law §3813 claim must be raised.

Smithtown Fire District, 28 PERB ¶3060. Representative's failure to attend rescheduled conference warranted ALJ's dismissal of the charge.

Sidney Central School District, 28 PERB ¶3066. Improper practice claim accrues for purposes of Education Law §3813 when party knows or should have known of the conduct constituting the alleged improper practice.

Orange County Correction Officers Benevolent Association (O'Hara). 28 PERB ¶3081. Filing period for charge against union not tolled during pendency of judicial proceeding brought by union seeking reinstatement of grievance which had been misfiled at arbitration stage. Discussion of "continuous representation" doctrine.

Town of Henrietta, 28 PERB ¶3079. Discussion of when litigation costs may be ordered.

Marlboro Faculty Association, 29 PERB ¶3007. Charge pleaded in conclusory fashion dismissed.

City of Troy, 29 PERB ¶3004. Make-whole order held not punitive despite City's financial condition.

Beckerman v. Comsewogue Union Free School District, ___ A.D.2d ___, 29 PERB ¶____ (2d Dep't 1996). Permission to file late Education Law §3813 notice of claim should be granted by court absent District's demonstration of prejudice if District is on notice of a timely-filed improper practice charge.

Union-Endicott CSD v. PERB, 29 PERB ¶7004 (Sup. Ct. Alb. County) (March 1996). Participation at PERB hearing is the practice of law. Over objection, PERB may not proceed to hearing if a party is represented by a nonattorney. (appeal pending)

Sidney Central School District, 29 PERB ¶3021. Timeliness of charge and satisfaction of notice of claim requirements are separate issues.

RULE CHANGES

Rule changes, affecting primarily representation proceedings, because effective February 28, 1996 and March 15, 1996.

COURT CASES

Schenectady PBA v. PERB, 196 A.D.2d 171, 27 PERB ¶7001 (3d Dep't 1994), aff'd, 85 N.Y.2d 480, 28 PERB ¶7005 (1995). Light duty and submission to surgery requirements of General Municipal Law (GML) §207-c are not subject to mandatory negotiations. Medical confidentiality waiver is similarly nonmandatory as part of the legislative scheme of the GML to the extent the waiver is "absolutely necessary" to implementation of the GML.

Deposit Central School District v. PERB, ___ A.D.2d ___, 28 PERB ¶7013 (3d Dep't 1995). Notice of claim provisions of Education Law §3813 applicable to a refusal to bargain charge premised on surface bargaining. PERB, not ALJ, is the "court of original jurisdiction" with which failure to satisfy can be raised. Notice of claim satisfied by school district's receipt of improper practice charge within 90 days of the date the claim arose. (motions for permission to appeal dismissed and denied)

MISCELLANEOUS

Board of Education of Buffalo City School District v. Buffalo Teachers Federation, Index No. 10728/93 (Sup. Ct. Erie Co. 1994), aff'd, 217 A.D.2d 366, 28 PERB ¶7008 (4th Dep't 1995). Waiver of ratification and order to execute contract does not waive or eliminate separate requirement of legislative approval. Supreme Court finds that approval was required as to "compensation" or "compensation-related" provisions of the contract, but also suggests that legislative approval extends to contract provisions that fall within a board of education's delegated authority under the Education Law. Appellate Division restricted review to "compensation provisions" (permission to appeal to Court of Appeals granted).

Middle Country Administrators Association v. Middle Country Central School District, 28 PERB ¶7504 (Sup. Ct. Suffolk County), aff'd, ___ A.D.2d ___, ___PERB ¶____ (1st Dep't 1996). A duly elected board of education has the statutory authority, even during its lame duck period, to approve a multi-year collective bargaining agreement, provided the terms of the agreement are fair and reasonable.

Westchester County Correction Officers Benevolent Association, Inc. v. County of Westchester, ____ A.D.2d ____, 28 PERB ¶7507 (2d Dep't 1995). Mutual acceptance of fact-finding report creates an agreement subject to legislative approval. (permission to appeal denied)

Orleans-Niagara BOCES Teachers' Association, 28 PERB ¶3050. All relevant evidence, whether direct or circumstantial, must be considered in assessing union's responsibility for an unlawful strike.

AN UPDATE ON SECTION 803 CLAIMS

By Beth Bourassa
Whiteman Osterman & Hanna

CASDA Summer Law Conference
Century House, Latham, New York

July 16, 1996

School districts around this State are grappling with numerous and costly claims made by teachers and noninstructional employees who assert that under §803 of the New York Retirement and Social Security Law, they have a right to retroactive membership In either the New York State Teacher's Retirement System ("TRS") or the New York State and Local Employees Retirement System ("ERS") back-dated to the time of their initial part-time or substitute service. Section 803 provides a three-year window of opportunity for employees to submit these claims. The statute was effective on October 24, 1993 and under the current statute, claims may be submitted through October 24, 1996.

To date, the impact of §803 claims has been significant, to say the least. As of July 1, 1996, 4,385 claims for retroactive membership had been submitted to TRS. Of these, 2,455 claims have been approved, at a cost to school districts and BOCES of $35.5 million.

In addition, a total of 17,000 claims have been submitted to ERS, which includes numerous state and local government employers as well as school districts and BOCES. Of these, 5,000 claims had been approved as of July 1, 1996, for a total cost of $49.4 million. ERS estimates that approximately $10 million of that amount has been assessed against school districts and BOCES as a result of approved claims submitted by non-instructional employees. The total impact on school districts and BOCES thus exceeds $45 million to date, and we still have a long way to go.

The courts, too, are grappling with §803 claims. To date, there have been at least a dozen (and probably more) lower court cases arising out of §803 claims. Many more such cases are pending. In addition, at least two actions challenging the constitutionality of §803 are pending. Although appeals are pending in at least three decided cases, it is unlikely that we will see any appellate court guidance until at least the end of this year.

In the meantime, the lower courts continue to reach inconsistent results with respect to a number of issues. These include: Who has the burden of proving eligibility for retroactive retirement system membership under §803? Is it the member/claimant, on whom the statute appears to place the burden of proof? Or is it in effect the employer, upon whom several courts have explicitly or implicitly shifted the burden of proof? Another as yet-unresolved question is which employer is liable under §803? Is it a member/claimant's very first public employer, upon whom the statute appears to impose liability? Or is it whatever employer a member/claimant contends was his or her first employer as of the date for which retroactive membership is sought? Both TRS and ERS, as well as at least one court, take the latter position.

Section 803

Under §803 of the Retirement and Social Security Law, a public retirement system may grant relief from a member's failure to file an application for retirement system membership in connection with service rendered prior to April 1, 1993. As a practical matter, nearly all §803 claims have arisen in connection with service rendered prior to 1985 or 1986, when the use of declination forms was made mandatory by statute.

Unquestionably, many part-time teachers and other part-time school district employees were not timely apprised of their opportunity to join a retirement system. For example, prior to 1979, when TRS first promulgated its regulations governing retirement system membership, (21 NYCRR §5000.1(d)) there was a widespread misconception that part-time or substitute teachers were not eligible for membership in TRS. In

fact, part-time and substitute teachers have been eligible for such membership since 1953. Section 803 attempts to remedy the problem faced by eligible employees who lost out on the successively more generous benefits available to members in earlier tiers because they did not have an opportunity to join ERS or TRS.

Briefly, the member submits an application to TRS or ERS, which in turn provides the member with an employer affidavit that must be completed by the appropriate employer. As will be seen, which employer is the appropriate employer to complete that affidavit is an issue that has not yet been resolved.

Assuming that the member did not expressly decline membership in a form filed with the employer, the statute squarely places upon the member seeking retroactive membership the burden to prove by substantial evidence that he or she did not:

> (1) Participate in a procedure explaining the option to join the retirement system in which a form, booklet or other material that was read from, explained or distributed can be produced and documentation or a notation to the effect that he or she participated exists; or
>
> (2) Participate in a procedure that a reasonable person would recognize as an explanation or request requiring a formal decision by him or her to join a public retirement system.

N.Y. Retire & Soc. Sec. Law §803(b)(3) (McKinney's Supp. 1996). The statute further requires the employer to establish a review process which affords a member an opportunity to appear in person or in writing. This does not require that employer hold a full on-the-record adjudicatory hearing. The review process can be an informal one, so long as a record adequate for judicial and/or administrative review can be established. The

statute further provides that if the member's application will be denied, the employer must produce an affidavit setting forth a statement of the grounds on which such denial was based.

Under §803, retirement system membership will only be granted retroactively back to the date from which the member established "continuous service." Continuous service is defined as at least 20 days of eligible service during each plan year of the applicable public retirement system. Id. §803(b)(2). A break in service of one year for any reason or two years attributable to the birth, adoption or foster care of a child is acceptable.

Under §803, as originally enacted, the entire cost of retroactive membership is borne by the employer who employed the member at the time when he or she was first eligible to join a retirement system. Id. §803(e). A 1995 amendment "socialized" part of the costs in cases in which the member was subsequently employed by another public employer. This amendment was enacted in response to some of the earlier decided §803 cases, in which certain public employers were saddled with grossly disappropriate costs for an individual who was employed for only a brief period of time. For example, in a case involving the North Syracuse Central School District, the district was assessed costs exceeding $37,000, for an individual who had been employed by that district as a substitute teacher for a total of five days. North Syracuse Central School District v. TRS, (Sup. Ct. Albany County, April 19, 1995). The benefits of this 1995 amendment are available, however, only in cases in which the employer's affidavit was filed with the appropriate retirement system on or before June 1, 1995. See 1995 N.Y. Laws, Ch. 683, §2.

The process for administrative and/or judicial review of the employer's determination differs depending upon whether the claim is filed with ERS or TRS. Under regulations promulgated by the New York State Comptroller, who heads up ERS, claims must be reviewed administratively prior to any judicial review. The administrative review process may include an administrative hearing and subsequent review by the Comptroller. See 2 NYCRR 359.5(g). The Comptroller's decision then becomes the final agency determination which may be reviewed by a court under CPLR Article 78.

Although it is authorized by the statute to do so, TRS has not promulgated similar regulations. Instead, under TRS procedures, it is the employer's determination that constitutes a final determination for purposes of judicial review. TRS does not become involved at all in reviewing the claim. Instead, if a TRS member is unhappy with the employer's determination he or she may proceed directly to court to obtain judicial review of that determination under CPLR Article 78.

Due to this procedural short-cut, most, if not all, of the §803 cases decided by the courts to date have involved claims for retroactive membership in TRS. The cases which have been decided to date have been consistently inconsistent.

First Employer Liability

One issue on which the courts are divided is whether it is a member's very first public employer or the employer who employed the member on the date for which retroactive membership is sought who must complete the employer affidavit, and, if the claim is granted, bear the costs of retroactive membership. At least two courts have squarely addressed this issue and have reached opposite conclusions.

The "first employer" issue typically arises in cases in which the member seeking retroactive membership cannot establish a chain of continuous service dating all the way back to his or her very first public employer. The real issue is whether this break in continuous service renders the member ineligible for relief under §803, or whether the member can simply seek membership retroactive to some later date when continuous service was established.

For example, let us assume that a TRS member was first employed by district A as a substitute teacher from 1970 through 1972. The teacher then resigned her employment to raise a family, or for some other reason. In January, 1976, the teacher resumed part-time substitute teaching at District B. In 1980, she

became employed by District C as a full-time teacher and joined TRS as a Tier III member. The teacher cannot establish eligibility for TRS membership retroactive back to 1970, which would give her Tier I status, due to her break in service from 1972 through 1976. Can she instead submit her employer affidavit to and impose the cost of retroactive Tier II membership on District B by basing her claim for retroactive membership on service which has been continuous since 1976?

Both TRS and ERS would answer that question in the affirmative. ERS' regulations state that it is "the employer which employed a §803 applicant on a date of retroactive membership being sought" who must complete the employer affidavit and who is liable under §803 if the claim is granted. 2 NYCRR §359.5(e). TRS takes a similar view, although it has not formalized its position in regulations. In fact, TRS and ERS take position that it is not appropriate for the employer to even inquire with respect to whether or not it was the claimant's first employer, or with respect to whether the claimant has met the continuous service requirement.

ERS' and TRS' views appear to contradict the literal terms of the statute, which refers to the employer which employed the member seeking retroactive membership "at the time he or she was first eligible to join a public retirement system." N.Y. Retire. & Soc. Sec. Law §803(b)(3),(e) (McKinney's Supp. 1996). Under the hypothetical facts above, the teacher in question was first eligible to join a retirement system back in 1970 when she began substituting at District A. Her subsequent break in service should render her ineligible for relief under §803. See id. §803(b)(2).

At least one court has accepted this interpretation of §803. In Foster v. Germantown Central School District, (Sup. Ct. Columbia County March 27, 1996), in which our office represented the respondent district, the claimant had previously been employed by several different school districts and had not once, but twice previously been a member of TRS. She terminated her employment in order to raise a family, and involuntarily withdrew her TRS membership due to insufficient service. She then returned to work as a part-time substitute teacher in Germantown in 1974. The district denied her application for TRS membership retroactive to 1974

on the grounds that it was not her first public employer, and thus could not be liable under §803. The reviewing court agreed. The court concluded that there was nothing in the legislative history or public policy to indicate that a member can avoid ineligibility for relief due to a break in continuous service by attempting to impose liability on a subsequent employer. The court noted that the legislative history of the statute was consistent with the unambiguous language of the statute, which is addressed to the employer who employed the member at the time when he or she was first eligible to join a public retirement system. The court further stated that if the Legislature had intended to impose a significant burden on the employer who hired the employee at the beginning at the last period of continuous service, it could have used language expressly so stating. In sum, the court found that the petitioner's prior employment as a school teacher and her two prior memberships in TRS conclusively established that Germantown was not the employer who employed her at the time when she was first eligible to join a public retirement system and that it thus could not be held liable under §803.

A few days after Germantown was decided, another court reached the exact opposite conclusion in a case entitled Leland v. Wappingers Central School District, (Sup. Ct. Albany County, March 30, 1996). In practical effect, the facts were nearly identical to those in Germantown. Leland involved a total of four petitioners, all of whom who have previously been employed by at least one other school district. Three of the four petitioners had previously been members of TRS. Unlike the Germantown case, however, TRS was made a named defendant in the Wappingers case. TRS thus had an opportunity to present to the court its interpretation of §803, which is that the first employer in the chain of continuous service (and not necessarily the member's very first public employer) is responsible for determining §803 eligibility and for paying the associated costs. The court accepted TRS' interpretation on the grounds that §803 is a remedial statute and that deference was due to TRS, as the agency responsible for administering that statute. The court apparently felt TRS' construction of the statute would further the remedial purpose in that far more members would be eligible for retroactive membership if they could avoid a break in their continuous service by pinning liability on their first public employer at whatever point they happened to resume continuous service.

The Germantown case has been appealed to the Appellate Division, Third Department, which includes the capital district area. Wappingers has been appealed to the Appellate Division, Second Department, which includes territory downstate. It is entirely possible that these two mid-level appellate courts may reach different results. This issue may ultimately have to be resolved, if at all, by this state's highest court, the New York State Court of Appeals.

In the meantime, in the absence of any appellate authority to the contrary, you may wish to take the position that your district is not liable for claims submitted by a claimant who was previously employed by at least one other public employer. In that case, the claimant's entire personnel file should be reviewed to determine whether the claimant was previously employed by another public employer.

Burden of Proof

Another issue which has confounded the courts to date is whether the member seeking retroactive retirement system membership, or the employer, has the burden of proving that the member was or was not timely afforded the opportunity to join the appropriate retirement system. The statute appears to squarely place the burden of proof, by substantial evidence, on the member. N.Y. Retire & Soc. Sec. Law §803(b)(3) (McKinney's Supp. 1996). At least one court, however, has apparently turned the statutory language on its head by effectively transferring that burden of proof to the employer. In Clark v. Kingston City School District, (Sup. Ct. Albany County November 29, 1995), the court decided that in requiring members to prove by substantial evidence that they were not informed of their eligibility to join TRS, "the Legislature has created a seemingly insurmountable burden." The court decided that "the Legislature could not have intended . . . such unreasonable and potentially unjust consequences." The Kingston court effectively relieved the §803 claimant of his or her burden of proof by finding that a claimant's uncorroborated statement that he or she was not given an opportunity to join TRS must satisfy the substantial evidence test.

The court apparently overlooked the fact that public employers may face an equally "insurmountable burden" under §803. For example, because declination forms were not required until 1985 or 1986, it is unlikely that an employer could prove, prior to that time, that a claimant expressly declined the opportunity for ERS or TRS membership. This case has also been appealed to the Appellate Division, Third Department. It is scheduled for oral argument in September and should be decided by the end of the year.

A number of other courts have shown somewhat more restraint in keeping the burden of proof where the statute places it -- on the member. Some of these courts, however, have held if the employer produces no contrary evidence, the member's uncontested statements, standing alone, may constitute substantial evidence and satisfy the burden of proof. See, e.g., Mogg v. Brentwood Union Free School District, (Sup. Ct. Suffolk County March 1, 1996). Even though the employer technically does not have to prove a thing, therefore, it certainly behooves the employer to present whatever evidence it has in opposition to a claim. That brings us to the question of what type of evidence will suffice to refute a member's claim.

It is always difficult to recreate events which occurred, or did not occur, 20 years or more earlier. That is why we have statutes of limitation, which bar certain claims after the passage of a specified period of time. The most highly motivated §803 claimants, of course, are those for whom retroactive membership will mean a shift in tiers. In many cases, therefore, claims will arise based on part-time or substitute employment prior to or during the early to mid-1970s, when Tiers II and III became effective.

The strongest evidence with which to oppose a §803 claim, if you are fortunate enough to have it, is an affidavit or testimony by an individual who was responsible for informing new employees of their right to join the retirement system at the time in question. In cases where the employer has been able to produce such evidence, the employer's determination denying §803 claims has uniformly been upheld. E.g., Beck v. Bethlehem Central School District, (Sup. Ct. Albany County November 28, 1995).

Of course, in many instances, such direct testimony by a person with first-hand knowledge is not available. The individual may be deceased, or retired and/or relocated, or may simply be unable to recall pertinent details. In the absence of such direct testimony of proof, what else will suffice?

- Circumstantial evidence (such as TRS or ERS quarterly reports) showing that other similarly situated part-time employees became members of TRS or ERS at or around the time that the claimant was first employed. Such evidence tends to show that the employer had an established practice or policy of informing part-time employees of their option to join a retirement system. See Spaid v. Liverpool Central School District, 642 N.Y.S.2d 783 (Sup. Ct. Onondaga County March 22, 1996).

- Memoranda or other documents for the relevant time period, explaining the option to join a retirement system, copies of which may still be found in an employee's personnel file. Even if the employee did not complete a declination form, evidence that such memoranda existed may suffice to show that the district had a policy or practice of distributing this information to part-time employees at the time. See Catalano v. Western Suffolk BOCES, (Sup. Ct. Suffolk County Feb. 16, 1996).

- Information pertaining to retirement system membership and benefits set forth in a collective bargaining agreement from the relevant time period may also suffice. Such evidence will be germane only if the claimant was employed in a bargaining unit position and had access to the collective bargaining agreement.

Several courts have concluded, however, that a mere question on an employment application with respect to whether or not the applicant is currently a member of ERS or TRS does not constitute sufficient

evidence of a procedure that a reasonable person would recognize as an opportunity to join the appropriate retirement system. E.g., McBride v. Greece Central School District, (Sup. Ct. Monroe County Oct. 18, 1995).

The informal review process, which may involve the submission of written evidence and/or the conduct of an informal hearing, should take place before the affidavit is completed, so that all relevant evidence may be brought to bear on the determination. ERS regulations expressly require that the employer attach to the [illegible]vit a statement of the reasons for denying the claim. 2 NYCRR §359.5(d). Although TRS does no[illegible] a similar requirement, the terms of the statute itself require that the employer affidavit must include a statement of the grounds on which the denial of the claim was based. N.Y. Retire. & Soc. Sec. Law §803(b)(3) (McKinney's Supp. 1996). In at least one case, a reviewing court annulled an employer's determination denying a §803 claim and remanded the matter to the employer for a new hearing because the employer failed to supply a statement of its reasons for denying the claim. Johnson v. Irondequoit Central School District, (Sup. Ct. Monroe County Aug. 17, 1995).

All of the reasons for denying a claimant's application should be set forth in the employer affidavit, thus reserving these issues for any subsequent administrative or judicial appeal. The efforts which you make to adequately review and document your response to such claims will make it that much easier to subsequently defend your decisions, if necessary.

Constitutional Challenges

To date, the courts have not yet decided whether §803 passes constitutional muster. There are at least two cases presently pending which raise a direct constitutional challenge to §803. One case was commenced in June, 1995, in Suffolk County by a number of Long Island school districts and individual taxpayer-residents of those districts. The second case was commenced by the Haverstraw-Stony Point Central School District and a number of individual taxpayer-residents of that district in August, 1995 in Rockland County. Both cases have

been transferred to Albany County at the request of the Attorney General. The state defendants have moved to dismiss, and no decision has yet been issued in either case.

Plaintiffs and the New York State School Board's Association, which has filed an amicus brief in support of the Haverstraw-Stony Point Central School District, have raised a number of novel and creative constitutional arguments. Among other things, they claim that §803:

- Impairs the obligations of contracts in violation of Article I, §10 of the United States Constitution, in that there may be no relationship between the length of an employee's service for the first employer, and the amount of increased costs the first employer will have to pay towards the cost of retroactive membership;

- Violates the equal protection and/or substantive due process rights of affected employers under the federal and New York State Constitutions, for the same reason, and because §803 punishes public employers for failing to use declination forms at a time when the use of such forms was not required;

- Deprives affected employers of procedural due process, in violation of the federal and New York State Constitutions, in that under TRS' and ERS' construction of the statute, an employer is not even supposed to inquire as to whether it is in fact, the first public employer, or whether the employee meets the continuous service requirement, or whether the employee may have declined retirement system membership while in the employ of another employer; and

- Requires an unlawful gift of public funds in violation of Article VIII, §1 of the New York State Constitution, because there is no legal or moral obligation to provide eligible members with increased benefits and/or a shift in Tier status.

It is always difficult to predict the outcome of pending constitutional litigation. Nevertheless, I will hazard a guess that §803 will likely be found constitutionally valid. Legislation is generally presumed to be constitutional, thus rasing a difficult hurdle for Plaintiffs to overcome. Moreover, legislation which merely affects economic rights, no matter how severe that effect may be, generally need only have a rational basis to survive constitutional scrutiny. The state defendants have pointed to the remedial purpose of §803, which was designed to right the wrongs occasioned when numerous public employees were not timely notified of their right to join the retirement system, thus losing out on successively more generous retirement benefits available in earlier tiers. The state defendants also rely on Article VII, §8 of the New York State Constitution, which expressly authorizes the legislature to increase the amount of pension benefits for any member of a public retirement system. In addition, given the length of time which elapsed before these cases were brought, (nearly two years after the statute was enacted), the court will likely be cognizant of the enormous disruption which would be occasioned if §803 was found unconstitutional.

In sum, ERS and TRS members have a little over three more months, until October 24, 1996, in which to submit claims for retroactive retirement system membership. It will likely take several more years for all of those claims to be resolved and for litigation arising out of pending and future claims to be completed.

SEXUAL HARASSMENT: CURRENT DEVELOPMENTS

Tenth Annual School Law Conference
of the
Capital Area School Development Association

Jonathan P. Nye

Whiteman Osterman & Hanna
One Commerce Plaza
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I would like to make two observations about sex harassment cases. First, although the standards for evaluating whether conduct can constitute sex harassment are well developed, it is still possible -- indeed not unusual -- to read or hear a description of the facts of a particular case and then be surprised by its outcome. Second, again despite the relative clarity of standards for evaluating conduct, the principles for determining when that conduct can give rise to liability, are at best confusing and at worst conflicting.

So that we can derive from this state of facts something more useful or productive than abstract entertainment, I'd like to take a few moments to explain why these elements of unpredictability make a well-crafted and actively implemented sex harassment policy that includes an educational component indispensable for any employer.

To work towards this conclusion, I would like to summarize first the legal standards applicable to claims of sex harassment. We will note that although the principles for evaluating harassing conduct are well established and not particularly controversial, the element of subjectivity in every sex harassment case makes outcome prediction problematic. Then we will see that the standards for determining when harassment as a matter of law produces legal liability, and for whom, are not well developed, and

they also produce surprising results. Then, just to make sure that the point about subjectivity is clear, I will engage in a little story telling to give us an opportunity to apply the principles we have examined. And finally, I hope to transform the resulting confusion into a demonstration of the compelling need for any employer to have an effective sex harassment policy in the first place.

I. Legal Standards Applicable to Claims of Sex Harassment

Sex harassment claims generally[1] arise in the context of an employment relationship. Such claims are premised upon Title VII of the Civil Rights Act of 1964, which prohibits employers from discriminating "against any individual with respect to . . . compensation, terms, conditions, or privileges of employment because of such individual's . . . sex . . . ." 42 U.S.C. §2000 e-2(a)(1). For well over a decade, sexual harassment has been

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[1] The term "sex harassment" may occasionally be used in connection with claims involving sexually oppressive teacher/student or student/student conduct, which claims are raised under Title IX of the Education Amendments of 1972. See Franklin v. Gwinnett County Public Schools, 112 S.Ct. 1028 (1992). Claims akin to sex harassment were also brought, prior to recognition of the applicability of Title VII, on common law theories. See, e.g., Corne v. Bausch and Lomb, Inc., 390 F.Supp. 161 (D. AZ 1975), vacated 562 F.2d 55 (4th Cir. 1977). Individual state human rights or antidiscrimination laws may also apply. In general, however, Title VII of the Civil Rights Act of 1964 is the predominate vehicle for sex harassment claims.

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recognized by the courts as a violation of Title VII. See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986).

The Meritor Court defined sexual harassment as "unwelcome sexual conduct that is a term or condition of employment." Id. See also EEOC Policy Guidance on Current Issues of Sexual Harassment, 60 DLR E-1, 1990 (BNA).

The EEOC Guidance explains that "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual, or (3) such conduct has a purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment." 29 C.F.R. §1604.11(a).

Building on and interpreting these sources, the courts have come to categorize two types of sexual harassment -- typically referred to as "quid pro quo" and "hostile environment" claims. Quid pro quo harassment arises from the conditioning of employment benefits on yielding to sexual demands. Meritor at 64-65; See also 29 C.F.R. §1604.11(a)(1) and (2). In other words, these claims

arise from demands for sexual favors that are backed up by actual or apparent threats (or promises) of loss or change of employment. Hostile environment harassment arises out of conduct that creates a sufficiently sexually-threatening, uncomfortable or offensive environment that it becomes, in effect, a term or condition of employment. The distinction between the two kinds of harassment is important not only as a descriptive tool for evaluating the conduct complained of, but because ultimate determinations of liability often depend on the kind of harassment alleged.

A. Quid Pro Quo Harassment

Under the quid pro quo theory, a plaintiff must prove that he or she "was denied an economic benefit either because of gender or because a sexual advance was made by a supervisor and rejected by [him or] her." Kotcher v. Rosa and Sullivan Appliance Center, Inc., 957 F.2d 59, 62 (2d Cir. 1992), citing Meritor at 64-65. "If the plaintiff can show that she suffered an economic injury from her supervisor's actions, the employer becomes strictly liable without any further showing of why the employer should be responsible for the supervisor's conduct." Kotcher at 62.

In a quid pro quo action, the acts of the harassing employee are generally automatically imputed to the employer because the harassing supervisor, by definition, has the actual or apparent

power to affect a tangible job benefit or privilege of the victim. See Carrero v. New York Housing Authority, 890 F.2d 569, 579 (2d Cir. 1989). Accordingly, an employer can be held liable under a quid pro quo theory without any showing of knowledge of the improper behavior.

B. Hostile Environment Harassment

Hostile environment claims are analytically more complex. First, the plaintiff must show the presence of sufficiently offensive conduct that creates the requisite hostile environment. In addition, it must be demonstrated that it is appropriate to place legal responsibility for that hostile environment on the employer.

The crux of the first element of the claim is that the employee was subjected to unwelcome culpable conduct. One practical difficulty with evaluating the element should be obvious: the focus is on the victim's subjective experience and not necessarily on the conduct itself or the harasser's intent. Later, we will see just how significant this subjective element can be, and why seemingly inconsistent results on largely similar facts can be reached.

In order to maintain a hostile environment claim, a plaintiff must show:

> (1) subjection to unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature. The conduct must be unwelcome in the sense that the employee regarded the conduct as undesirable or offensive. Trotta v. Mobil Oil Corp., 788 F.Supp. 1336, 1348 (S.D.N.Y. 1992);
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> (2) that the harassment in its totality affected a term, condition or privilege of employment. Put differently, the conduct must be shown to be sufficiently severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment. Trotta at 1349. To make this assessment, courts will evaluate the frequency of the inappropriate conduct, its severity, whether it is physically threatening or humiliating as opposed to merely offensive, and whether it unreasonably interferes with an employee's work performance.

While one may question whether there is such a thing as "moderately" offensive conduct, as a general rule the more egregious the conduct, the less pervasive it must be, while conduct that might, in isolated instances, not be sufficient to alter the

work place environment, may do so if it becomes pervasive. The focus must be on the totality of the circumstances.

Once these elements are shown, the complainant has established the existence of a hostile environment. Whether the presence of such an environment gives rise to anyone's legal liability must then be addressed.

In Meritor, the Supreme Court observed somewhat casually that courts should be guided by "agency principles" in resolving questions of liability. Unfortunately, courts have undertaken this evaluation inconsistently, and have on average been far more likely to relieve an employer from liability for the acts of a supervising harasser than for a delivery truck driver's negligence. Some courts have held that liability should be imposed on the employer only if the employer knew or should have known of the wrongful conduct and failed to take prompt remedial action reasonably calculated to end it. Such prompt and adequate responses include investigating the complaint promptly and effective action to remedy the problem, i.e., transferring or demoting the harasser.

An employer can have either actual or constructive knowledge to be found liable. The pervasiveness of the harassment can establish constructive knowledge and may also give rise to an inference of inadequacy in the employer's grievance procedure.

Filing an internal complaint or a formal charge with the EEOC will also give the employer notice.

As these principles may seem clear enough, let's examine some recent developments on the issue of liability.

II. Recent Developments Concerning Scope of Liability Under Title VII

A. To What Extent Are Actions of Employees Imputed to the Employer?

Pamela Kotcher and Barbara Davis were employed by the Sullivan Appliance Center as a commissioned sales person and office clerk, respectively. They worked in an Upstate New York store managed by Herbert Trageser. Trageser directly supervised both employees.

Kotcher and Davis accused Trageser of repeated episodes of sexual harassment in the form of vulgar comments and gestures. For example, Trageser commented to Kotcher that if he had the same bodily "equipment" as she, his sales would be more substantial. On a regular basis, often in front of others at the store, he would stand behind her and engage in mock sexual acts. Trageser made numerous comments about Davis' breasts and other body parts. He similarly made offensive gestures towards her when her back was

turned and on one occasion even grabbed her, leaving bruises on her arm.

The district court (the trial level) found that neither Kotcher nor Davis welcomed this conduct, as each had made it known immediately to Trageser that his comments and conduct were not appreciated. The district court similarly found that these acts were sufficiently offensive and persuasive to create a hostile environment within the meaning of Title VII.

The Court also concluded, however, that Trageser's actions -- even though he was the manager of the store and Kotcher's and Davis' ultimate supervisor, could not be used to impose liability on a company headquartered in another town: Rosa and Sullivan.

On appeal, Kotcher contended that because she and Davis had complained to Trageser and to other persons at the store, there were enough people in the company, both fellow employees and other supervisors, who knew about the offensive conduct to warrant a finding of at least constructive notice to the company. Kotcher also noted that since Trageser was himself the decision-maker for the store, the company should be directly accountable for his conduct in any event. Indeed, ordinary "agency" principles should so compel.

Although the Second Circuit admitted that it did "sympathize" with Kotcher, it declined to make any such ruling, and said that the district court could reasonably have found that the company, whose main office was in a different city, did not have either actual or constructive notice of Trageser's conduct. Kotcher v. Rosa & Sullivan Appliance Center, Inc., 957 F.2d 59, 64 (2d Cir. 1992).

In another case, Sally Klessens worked for the Post Office as a mail handler. One of her co-workers began making sexually explicit remarks to her about her body and persisted in asking her for dates. The co-worker announced to Klessens on a number of occasions that if he didn't "get laid" he was going to "take hostages," commented on his perceptions of the quality and size of various parts of her body, and recounted to her at length his own sexual exploits.

Klessens complained to her supervisor, John Russell, about the co-worker's conduct. Russell then repeated his own views about getting "laid" in front of Klessens and the offending co-worker, and then put his arm around Klessens, claiming he did so in the same way as shaking a person's hand. Klessens then reported this conduct to Russell's supervisor, Mark Persson. Persson declined to say that he would do anything, but did acknowledge that the co-worker had done this sort of thing before, having written a letter

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to another female that "he wanted to slip his tongue so far up her . . . ." Klessens v. U.S. Postal Service, 66 Fair Emp. Prac. Cas. (BNA) 1630. Klessens continued in her complaint, and ultimately the co-worker was transferred. Not long thereafter, Klessens was discharged.

In denying Klessens any relief, the district court found that "as soon as the alleged sexual harassment was brought to the attention of defendant's management with authority to take corrective action the offending employee . . . was promptly transferred to another of defendant's facilities." 66 Fair Emp. Prac. Cas. 1633.

When read in conjunction with the preceding decisions regarding individual liability, it becomes clear that determining what constitutes the "employer" for purposes of a hostile environment claim is not a simple exercise. It is also clear that if the necessary claim of command is long enough and the plaintiff persistent enough, a good deal of time can pass and a good deal of harassment can occur, all of which can then be remedied by an appropriate transfer or order to cease and desist, without any liability on the part of anyone.

Does this mean in some instances no one can be held legally responsible for the creation of a hostile environment? Until recently, the answer was not necessarily.

B. Is There Individual Liability Under Title VII?

In September of 1995, the United States Court of Appeals for the Second Circuit (with jurisdiction over cases arising in New York State), resolved what had previously been the subject of conflicting decisions among the various district courts in the jurisdiction, i.e., whether individuals, even those with supervisory control over a plaintiff, may be held personally liable to that plaintiff under Title VII. Tomka v. Seiler Corp., 66 F.3d 1295 (2d Cir. 1995). In Tomka, plaintiff was a female employer of the Seiler Corporation. She sued her employer and three co-defendants, claiming, among other things, a hostile work environment. Id. Plaintiff claimed that shortly after starting work, she was subjected to sexual jokes, comments and innuendo. Id. at 1300. Her harassment culminated in rape, which occurred after eating dinner and drinking with the defendants. Id. at 1302. The circuit court reviewed and affirmed the district court's grant of summary judgment to the individual defendants (co-workers and intermediate supervisors), holding that they could not be sued in their individual capacities. Id. The court reasoned:

> While a narrow [i.e., literal] reading of [Title VII] does imply that an employer's agent is a statutory employer [and thus can be individually liable], a broader consideration of Title VII indicates that this interpretation of the statutory language does not comport with Congress' clearly expressed intent in enacting that statute. In particular, we find that the statutory scheme and remedial provisions of Title VII indicate that Congress intended to limit liability to employer-entities with fifteen or more employees.

Id. at 1314.

The harassment involved in Tomka, at least for purposes of the appeal, involved only a hostile work environment. Recognizing this narrow scope, the plaintiff in Jungels v. State Univ. College of N.Y., 922 F. Supp. 779 (W.D.N.Y. 1996), tried to limit Tomka's holding to hostile work environment harassment, claiming that its ruling should not be extended to other Title VII cases. Jungels, 922 F. Supp. at 782. The court rejected this argument because "the Second Circuit reasoning in Tomka applies not only to hostile environment sex discrimination cases, but to all Title VII actions." Id.

The Ninth Circuit (embracing California and other western states) similarly has ruled against individual liability under Title VII. Miller v. Maxwell's Intern. Inc., 991 F.2d 583 (9th Cir. 1993). In Miller, plaintiff was a female employee of a restaurant. Id. at 584. She brought suit against the restaurant,

its corporate owner, her managers, and several lower level employees, claiming that she was not promoted because of her sex and age, and that when she complained to the EEOC, was subjected to a hostile work environment. Id. The circuit court affirmed the district court's decision that the defendants were not personally liable. Id. at 587.

In Miller, the Appeals court noted that many courts that have purportedly found individual liability under the statutes have held individuals liable only in their official capacities and not in their individual capacities.[2] 991 F.2d at 587. To counter the argument that precluding individual liability would encourage supervisory personnel to believe they could violate Title VII with impunity, the court said:

> No employer will allow supervisory or other personnel to violate Title VII when the employer is liable for the Title VII violation. An employer that has incurred civil damages because one of its employees believes he can violate Title VII with impunity will quickly correct that employee's erroneous belief.

Id. at 588.

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[2] Barqer v. State of Kan., 630 F. Supp. 88 (D. Kan. 1985) gives a good example of what it means to be sued in an official capacity as an individual: "[A] superintendent of a school district, as an agent of the district, and the manager of an Employment Security Commission office, as an agent of the Commission, may be sued under Title VII." Id. at 90.

In contrast, the Sixth Circuit does not apparently prohibit an individual from being held liable under Title VII. See Jones v. Continental Corp., 789 F.2d 1225 (6th Cir. 1986). In Jones, the plaintiff was a female who sued her employer for discrimination under Title VII. Id. The court permitted her to seek recovery against individual employees under Title VII. Id. at 1231. Apparently more impressed with the language of the statute than the Second Circuit, the court stated that "[T]he law is clear that individuals may be held liable ... as "agents" of an employer under Title VII." Id.

Plainly there is confusion over the circumstances in which liability for creation of a hostile environment can be found. Because much of that confusion arises from the courts' inconsistent interpretation of basic principles of agency law, many suggest that in time the courts will sort the issues out, and recognize that increased employer liability provides the best hope for eradication of sexual harassment in the work place.

Most of you, I suspect, would not be particularly troubled by such a development, because most believe (properly, we shall assume) that conduct such as that described above simply doesn't occur on their watch. In the next few minutes, let's explore why things may not be so simple.

III. Is It All a Matter of Perception?

As noted previously, because of the element of subjectivity, it is often difficult in a hostile environment case to determine whether the facts alleged, even if proven, could sustain a claim. That is because no matter how offensive the conduct may be objectively, it must be viewed by the victim during the course of employment as unwelcome. Accordingly, reports or descriptions of cases that focus solely on what the perpetrator did or did not do can provide examples of what conduct particular courts have found to be insufficiently egregious or pervasive to constitute sex harassment, but do not provide guidance that the same conduct, from the perspective of a different victim, could not yield a different result.

To demonstrate this point I hope more clearly, let me engage in a little story telling. The foundation for the story will be the basic facts in one of the best known sex harassment cases -- Meritor Savings Bank v. Vinson, decided in 1986 by the United States Supreme Court. The facts as I shall present them are similar to those described in the decision, with minor modification.

The plaintiff, whom we shall call Miss Jones, was fired from her position as assistant branch manager of a bank for taking

excessive sick leave. In response, she sued the bank, claiming that during her employment she had been the victim of sexual harassment.

Miss Jones began her career at the bank as a teller-trainee. During her training program, her supervisor, Mr. Smith, treated her in a fatherly way. Shortly after her training was completed, however, he invited her out to dinner, and during the course of the meal, suggested that they go out to a motel to have sex. She refused at first, but then agreed.

Over the next several years, during which period she advanced from teller, to head teller and then to assistant branch manager, Miss Jones had sex with Mr. Smith some 40 or 50 times. She also said that he fondled her in front of other employees, followed her into the women's rest room and exposed himself to her. She admits, however that she never told anyone about these events until she brought her lawsuit.

These activities stopped only when she began going with a steady boyfriend. Soon thereafter, she told the bank she was taking an indefinite "personal leave," and after 2 months of that leave, was fired.

In her suit, Miss Jones claimed that during her four years with the bank she had "constantly" been subjected to sexual harassment by Mr. Smith. At no time during her employment, however, had she ever complained to anyone about his behavior and indeed acknowledged that she had usually participated in sexual activities with him voluntarily.

Those facts then, are the basis of Meritor. And on these facts, the Supreme Court concluded that the plaintiff had stated a claim, that is, if she were able to prove her factual allegations, a jury would be entitled to find in her favor.[3] As you consider these facts, bear in mind that there was no allegation of quid pro quo harassment -- no suggestion that Miss Jones' promotions were not deserved or that they were secured because of compliance with express demands from Mr. Smith. The case is thus a "hostile environment" case.

At first blush, some may find it unlikely that 40 or 50 sexual encounters over a several year period, most of which were admittedly "voluntary", could provide the foundation for a claim of sex harassment. (At least that's the way the district court viewed the matter.) We should recognize, however, that the ultimate

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[3] At least insofar as establishing the existence of a hostile environment. In order for liability for that environment to be attributed to the bank, the court would have to resort to "agency principles."

assessment may depend less on the observable facts and more on the intentions or subjective views of the parties. To explore this point, consider the following supplemental facts, presented here with due apology for resort to politically incorrect stereotype.

What the Supreme Court didn't tell us was that Miss Jones was in actuality a young, fairly unsophisticated woman from a decidedly rural background. She had three children through various relationships, but with great courage and resolve had determined to build a good life for herself and her children. She believed she had been fortunate even to be admitted to the training program at the bank and worked extremely hard through the duration of the program to succeed.

Mr. Smith, a rather manipulative and predatory male whose hobby was sexual conquest, was helpful to her during the course of the program, and basically Miss Smith came to like him. It was extremely awkward for her at the restaurant when he proposed to have sex with her later that evening, for a variety of conflicting reasons: Although she did like him, she was ambivalent about sex, but was -- she now admits on reflection -- somewhat afraid that if she did not consent her career might be jeopardized.

As time and the relationship went on, Miss Jones became increasingly troubled by her recognition that she did not love Mr.

Smith, that the relationship was unsatisfying, and that she sought to avoid its continuation. She tried graciously to terminate the relationship, but whenever she attempted to do she found that Mr. Smith appeared to be emotionally agitated and refused to listen. Based on her own history of abusive relationships, she was quite concerned that his response would be violent.

The relationship yet continued. Miss Jones was torn by her recognition that she had a job that she desperately needed to support herself and her children, her fear, founded or not, that angering Mr. Smith would jeopardize that job, and her recognition that she found him and their relationship repulsive. She continued to try to terminate the relationship by putting him off, making excuses, or avoiding him. She had no one to talk to about her emotional turmoil, however, because she feared that disclosure of the relationship to any of her co-workers or superiors would jeopardize her job.

In time, she believed that her protestations were so direct and clear that Mr. Smith could not possibly believe her interest in him was genuine. She became convinced that he was simply using her for sex. While she knew that ultimately she would have the courage to terminate the relationship completely, the stress took its toll on her. Fortunately, she met another young man with whom she began to have a satisfying and meaningful relationship, and with his help

and understanding developed the courage at least to take time off from work for therapy. Because of that action, the bank terminated her.

The preceding facts, of course, were made up. The real story is quite different. What really happened was that Miss Jones was an intelligent and ambitious young woman. She was determined to make the most of her training program and believed that chumming up to the program director was a sure way to success. That task was made easier by his attractiveness, and more exciting because he was married. When, at the end of the session they dined together and he proposed sex, she was pleased on a number of levels. Sensing that Mr. Smith was somewhat easily manipulated, however, she at first played hard to get.

As time went on, Miss Jones progressed rapidly through the bank hierarchy. While she did not believe that any promotions were because of her relationship with Mr. Smith, she knew it didn't hurt either. She learned a lot from him, using him both as a role model and as a source of information that could be useful to her in her career climbing. While she did not have any particular romantic attraction to Mr. Smith, he was good looking and fun, rather easily manipulated, and fairly free with his cash.

From time to time, she sensed that he was lonely in his marriage and interested in a much more meaningful relationship. Although she was not, she was clever enough to play coy and to force him to be the pursuer.

Ultimately, however, Miss Jones began to tire of Mr. Smith and became attracted to another gentleman she met at her health club. When the other individual learned of her relationship with Mr. Smith, he became very angry and threatened to terminate the new relationship entirely. In addition to his qualities, this particular gentleman was a lawyer. He suggested to Miss Jones that given the circumstances of her relationship with Mr. Smith, she could likely terminate the relationship and take extended leave without fear of the consequences. To her surprise, during the midst of that leave she received a termination notice. Her lawyer friend took care of matters after that.

Irrespective of one's assessment of the implications of these admittedly distorted versions of the facts, it's likely that the sexual harassment claim as sketchily outlined in Meritor might look very different depending on what additional facts apply.

Without resolving that issue, several questions, I think, can be nonetheless raised by this exercise. If this is indeed a hostile environment case, how then is liability for Mr. Smith's

actions to be imputed to the employer bank? What if Mr. Smith were sufficiently senior for him to be deemed "the employer"? These issues are particularly troublesome where, as here, the subjective intentions of the parties -- not necessarily known to anyone else -- may be determinative.

The message I would like to leave you with is this. We are all sufficiently sensitive -- or at least hope we are -- to recognize the unacceptability, both from a personal and liability standpoint, of groping, graphic language, blatant demands for sexual favors, pornographic pictures or other activities that would give rise, in the mind of any reasonable person, to a hostile environment. Accordingly, it may be tempting to believe that our particular work place is relatively secure from liability.

An effective sexual harassment policy must not only eradicate these elements from the work place, however, it must recognize that not all harassment can be observed, and not all victims of harassment necessarily recognize that they are victims until the behavior patters are well established. Only a sex harassment policy that actually encourages education of employees of their rights and obligations and provides meaningful avenues for reporting complaints can be fully effective. Even if you have such a policy, I recommend that you stress and confirm its existence to all your employees.

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